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THE FIRM OFFER PUZZLE: A STUDY OF BUSINESS PRACTICE IN THE CONSTRUCTION INDUSTRY*

FRANKLIN M. SCHULTZ†

THERE HAVE BEEN SEVERAL ATTEMPTS to fill the void created by the disintegration of the common-law seal which once made offers firm without the necessity of consideration.¹ The most recent is the firm offer provision of the proposed Uniform Commercial Code:

An offer by a merchant to buy or sell goods in a signed writing which gives assurance that it will be held open needs no consideration to be irrevocable for a reasonable time or during a stated time but in no event for a time exceeding three months; but such term on a form supplied by the offeree must be separately signed by the offeror.²

The Code thus evidently assumes that in this area the law lags behind the practices of modern merchants.³

* This is a pilot project of the Contracts Editorial Group of the Committee on Auxiliary Business and Social Materials of the Association of American Law Schools. In 1949, as chairman of this group, the writer conducted an informal survey of some twenty Contracts teachers to determine the advisability of preparing non-legal materials for Contracts teaching. The results of this inquiry appear in the A.A.L.S. Handbook (1949), at 138. On the basis of numerous suggestions made by Contracts teachers the Group decided to experiment in the preparation of non-legal materials on narrow topics in the general area of offer, acceptance, and consideration. The construction industry "firm offer" problem which the writer undertook to investigate is raised in most Contracts casebooks under the topic of "promissory estoppel." The leading "casebook cases" are *James Baird Co. v. Gimbel Bros., Inc.*, 64 F. 2d 344 (C.A. 2d, 1933) and *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F. 2d 654 (C.A. 7th, 1941). For brevity, a general contractor will sometimes be referred to as a "general," a sub-contractor as a "sub," and "contractor" will be used to refer to both, when spoken of together.

† Associate Professor, Indiana University School of Law, Bloomington, Indiana. Several acknowledgments are in order: First, to Indiana University for research funds; second, to Messrs. William F. Radcliff and Bertrand Davis for excellent student assistance in collecting cases; and third, to Mrs. Joseph Baldoni for untiring secretarial help.

¹ See the Uniform Written Obligations Act proposed in 1925 by the Conference of Commissioners on Uniform Laws and adopted in only two states, Utah and Pennsylvania. Pa. Stat. Ann. (Purdon, 1949) c. 33 §§ 6-8; Utah Laws (1929) c. 62 but repealed, Title 88-1-2, Utah Rev. Stat. (1933); and N.Y. Pers. Prop. Law (Thompson, 1942) § 33(5). See *The New York Statute on Irrevocable Offers*, 43 Col. L. Rev. 487, 489 n. 7 (1943). *Jarka Corp. v. Hellenic Lines*, 182 F. 2d 916 (C.A. 2d, 1950).

² UCC § 2-205 (Spring 1951, Text ed.). See Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?* 59 Yale L. J. 821, 827-29 (1950).

³ In an early comment the draftsmen put it this way: "'Firm' offers expressed as such are so well known to merchants and are so firmly relied on that although they have rarely come into appellate litigation they require recognition by law in the rare case of revocation in bad faith." A.L.I., *Uniform Revised Sales Act* 120 (Proposed Final Draft No. 1, 1944). The classical position on revocation has been stated in 1 Williston, *Contracts* § 55 (rev. ed., 1936): "It is a consequence of the rule that unsealed promises without consideration are not binding,

Nowhere has this assumed hiatus between the law and business practice been more severely criticized than in the relationship of general contractor to subcontractor in the construction industry. To put a typical firm offer case, suppose that, while a general is preparing a lump-sum competitive bid, a sub states he will hold his subbid open for some specified period or until after the general contract is awarded. Since he is reputable and makes the lowest subbid, the general uses it in preference to others in making up his bid but does not inform the sub he has done so. The general is awarded the contract. A few days later the sub notifies the general that he must withdraw his subbid because of a sudden price rise. Was the general justified in relying on the sub's bid? What remedy does he have against the sub? The simple and direct answer of the common law is that he is out of luck—he should have given consideration. Consideration here means buying an option, making a contract (conditional on the award, of course), or employing some other binding legal device. Absent such consideration, he has no legal remedy. Does this represent an important commercial transaction which the law has failed to recognize?

Undoubtedly, this is an important transaction in terms of money, if nothing else. The construction industry is one of our major industries. Lump-sum competitive bidding, even in a period of unsettled price levels, is an important means of letting building contracts.⁴ The typical lump-sum contract between owner and general contractor is based on a competition supervised by the owner's architect. A substantial part of the general's bid to the owner which he will not handle himself must be based on the materials and labor costs of excavators, plumbers, electricians, roofers, plasterers, glazers, painters and many other subcontractors and materialmen.⁵ Since to estimate these complicated segments of the job on his own

that offers unless under seal or given for consideration may be revoked at any time prior to the creation of a contract by acceptance. Therefore, even though a definite time in which acceptance may be made, is named in such an offer, the offeror may, nevertheless, revoke his offer within that period. Nor is it material that the offer expressly states that it shall not be withdrawn; revocation is still possible."

⁴ The particular firm offer problem under consideration arises only in lump-sum bidding, that is, where the general contractor agrees with the owner to perform a contract for a stipulated sum. The other chief method of contracting, the cost-of-work-plus-a-fee method, is one under which the general contractor is reimbursed the entire amount expended by him in doing the work (including payments to subcontractors and materialmen) and for his own services is paid either a fixed sum agreed on in advance or a certain percentage of the reimbursed amount. See American Institute of Architects, *Handbook of Architectural Practice* 49 (1951). See also Schobinger & Lackey, *Business Methods in the Building Field* 48-52, 59-60 (1940).

⁵ If a general contractor is to succeed in a competitive bidding, he must obtain the lowest possible prices for materials and labor. Some items he will figure for himself. He may, for example, do all the carpentry work or the masonry or the excavation, or all three. Or he may, if he is a downtown broker, do nothing.

would be risky, the general estimates these costs by obtaining subbids. In a sense he holds a series of little competitions. Unlike the owner he does not call for sealed bids which are opened in the presence of the bidders. He does not require good faith deposits or bid bonds to secure the reliability of the bids. Instead the general asks for, and sometimes receives unsolicited, in writing or over the telephone, bids which are variously called proposals, quotations, offers or figures. Presumably he selects one bid which he uses as a basis for computing his general estimate. This he submits and awaits the result. Should he be so fortunate as to be awarded the general contract, he then awards a contract to a subcontractor. If the subcontractor revokes his bid before it is accepted by the general, any loss which results is a deduction from the general's profit and conceivably may transform overnight a profitable contract into a losing deal.

One of the legal questions to which this article addresses itself is the dependability of this subbid for the general contractor in the period between the time he receives it and the time he awards a subcontract. There is a converse problem from the subcontractor's side, namely, what assurance does he have that he will be awarded the subcontract, if the general invited his bid, and it was used as part of the general's estimate? Does he have a reasonable expectation of profit which the law will protect? This converse situation takes on additional importance where a subcontractor has purchased materials or taken other steps in reliance on the general's supposed use of his bid. To this problem the common-law answers that the subcontractor has no legal remedy unless the general has accepted his offer. The sub may not even recover his incidental expenditures. Whether this represents an important commercial event to which the law is blind is the second legal question which this article proposes to examine.

The purpose of this study is to examine these two questions from a multiple legal, economic and business point of view. The study was conducted in this fashion: First, a search was made for any appellate law on the subject since World War I and any pertinent legal commentary. Second, counsel's attempts in the discovered cases to prove business practice and usage as a means of interpreting or filling in the law were examined (based on the records and briefs of the cases, where available), along with the courts' disposition of this type of evidence. Third, in Spring 1951, the writer conducted a questionnaire survey of 137 general contractors and 275 subcontractors in a single state, Indiana, and also made an individual survey by personal interview of about a dozen contractors in one city, Indianapolis. Fourth, the bid and subcontract forms used by the contractors surveyed along with the forms employed by a large number of

local and interstate manufacturers and suppliers of material were scrutinized. Fifth, 165 letters were addressed to nationally listed professional organizations and trade associations to obtain their official and unofficial positions on this problem. Sixth, a study was made of the activities of these trade associations directed toward controlling competitive bidding, including efforts to enact state legislation.

This article is broken down into four divisions: (I) Litigation on the Firm Offer Problem in the Construction Industry, (II) An Attitude Survey of Generals and Subcontractors in Indiana, (III) Private Association and Governmental Concern with the Firm Offer Problem, and (IV) Summary and Conclusions.

I. LITIGATION ON THE FIRM OFFER PROBLEM IN THE CONSTRUCTION INDUSTRY

Cases and Legal Commentary

The leading case of a general contractor attempting to hold a subcontractor to his bid is *James Baird Co. v. Gimbel Bros., Inc.*⁶ The subcontractor,⁷ Gimbel Bros., a large New York department store, having learned that the state of Pennsylvania had asked for bids for the construction of a public building, had its estimator compute the amount of linoleum which would be required on the job. The estimator underestimated the total yardage by about half the proper amount. In ignorance of this mistake Gimbel's sent to some twenty or thirty contractors, likely to bid on the job, an offer to supply all the linoleum required by the specifications, concluding: "If successful in being awarded this contract, it will be absolutely guaranteed, . . . and . . . we are offering these prices for reasonable [sic] prompt acceptance after the general contract has been awarded." James Baird Co., a general contractor in Washington, D.C., received one of these offers on December 28. On the same day Gimbel's learned its mistake and telegraphed all contractors to whom it had sent the offer that it withdrew it and would substitute a new one at about double the amount of the old. The withdrawal reached Baird at Washington on the afternoon of the same day but not until after it had put in a bid at Harrisburg at a lump sum, based as to linoleum upon the prices quoted by

⁶ 64 F. 2d 344 (C.A. 2d, 1933). Because this article centers around business practices which change with some rapidity, the case research was limited to appellate decisions since World War I. So infrequent is litigation in this area that the total is less than a dozen; moreover, as this division will develop, general contractors have been singularly unsuccessful in recovering damages from revoking subcontractors.

⁷ Strictly speaking, Gimbel Bros. was a materialman, supplying but not installing the linoleum. But the term, subcontractor, will be used generically throughout this article to include suppliers, laborers or any combination of the two such as an electrical subcontractor.

Gimbel's. The public authorities accepted Baird's bid on December 30, Gimbel's having meanwhile written a letter of confirmation of its withdrawal, received by Baird on the thirty-first. Baird formally accepted Gimbel's offer on January 2, and, as Gimbel's persisted in declining to recognize the existence of a contract, sued for damages measured by the difference between Gimbel's bid and what Baird had to pay another supplier to furnish the linoleum. Judge Learned Hand, speaking for the Second Circuit, affirmed the dismissal of the complaint. The acceptance was too late, according to Judge Hand, "[u]nless there were circumstances to take it out of the ordinary doctrine, since the offer was withdrawn before it was accepted. . . ." To establish such circumstances, Baird had argued, first, promissory estoppel,⁸ and second, that inclusion of the linoleum bid in the general estimate carried the implication of a promise to pay for the linoleum in case it was accepted.

Judge Hand rejected the second argument, stating categorically that it was "entirely clear that the contractors did not suppose that they accepted the offer merely by putting in their bids."⁹ Even though the judge recognized the predicament in which general contractors were put when Gimbel's withdrew its offer after the bids went in, he could see the way around the exact language Gimbel's had used which looked "to the usual communication of an acceptance" and precluded "the idea that the use of the offer in the bidding" should be the equivalent. If Baird had wished to protect itself, Judge Hand added, it should have insisted on a contract before using the figures. As for the promissory estoppel argument, Judge Hand said that this doctrine was chiefly found in charitable subscription cases, involving donative promises, though it had recently been generalized in Section 90 of the *Restatement of Contracts*. Judge Hand suggested that "[o]ffers are ordinarily made in exchange for a consideration, either a counter-promise or some other act which the promisor wishes to secure. In such cases they propose bargains; they presuppose that each promise or performance is an inducement to the other." There was, he

⁸ The argument ran thus: That it was a reasonable implication from Gimbel's offer that it should be irrevocable in case Baird acted upon it, and thus Baird had put itself in a position from which it could not withdraw without great loss; that while it might have withdrawn the bid after receiving the revocation, the time to submit another bid had passed, and as the item of linoleum was a very trifling part of the cost of the whole building it would have been an unreasonable hardship to expect it to lose the contract on that account and probably forfeit its good faith deposit. *James Baird Co. v. Gimbel Bros., Inc.*, 64 F. 2d 344, 345 (C.A. 2d, 1933).

⁹ The judge buttressed this assertion by two question-begging illustrations: "If, for example, the successful one had repudiated the contract with the public authorities after it had been awarded to him, certainly the defendant could not have sued him for a breach. If he had become bankrupt, the defendant could not prove against his estate. It seems plain therefore that there was no contract between them." *Ibid.*, at 346.

concluded, no room for promissory estoppel in such a commercial transaction as this, where the offeror had bargained for a return promise to take and pay for the linoleum, not the inclusion of its bid, "which was a matter of indifference to it."¹⁰

The *Gimbel Bros.* case has met with a mixed reception in the legal literature. Prominent Contracts' scholars who have commented upon it have split fairly evenly in their reactions. Writing in support of the result, Sharp, long a crusader for wider judicial recognition of the firm offer, states it may best be explained "by an arguable construction of the offer as containing in fact a condition about acceptance inconsistent with responsibility in the circumstances of the case."¹¹ Elsewhere he suggests that "at least an alternative, and it seems the controlling ground of decision" is that it may be "ordinary business understanding that an offer for a bargain is revocable until the bargain is made, and to this extent, our common law view is sound."¹² Corbin, in his recently published treatise on Contracts, has accepted the decision as a reasonable limitation on the reliance doctrine (Section 90) on the theory that Gimbel's ought not to have foreseen that Baird would rely on the offer.¹³

On the critical side, Williston has suggested that *Gimbel Bros.* has been properly criticized by two law review writers for not applying Section 90, "since an offer too is a promise."¹⁴ One of the writers had pointed out that merely because there was no contract or tort pigeonhole, Baird had no remedy.¹⁵ The other writer had concluded "[a]pparently the requirements permitting application of the doctrine were present, but the court refused

¹⁰ Ibid. Finally, Judge Hand rejected the theory that the offer be regarded as "an option, giving the plaintiff [Baird] the right seasonably to accept the linoleum at the quoted prices if its bid was accepted, but not binding it to take and pay, if it could get a better bargain elsewhere," because, "[t]here is not the least reason to suppose that the defendant [Gimbel's] meant to subject itself to such a one-sided obligation."

¹¹ Sharp, *Pacta Sunt Servanda*, 41 Col. L.Rev. 783, 792 n. 27 (1941).

¹² Sharp, *Promissory Liability*, 7 Univ. Chi. L. Rev. 1, 10 n. 26 (1939). But Sharp adds in the next sentence: "To say, however, that a firm offer will not be given effect according to its terms, is something quite different."

¹³ 1 Corbin, *Contracts* § 51 (1st ed., 1950). That is, that Baird "would make a contract with a third person at a price that is determined by the terms of the bid, before the bid itself has been accepted and without notifying the bidder that his bid is going to be so used. Even if he knows that his bid will be used as a basis for bidding on some larger contract, it should still be revocable by notice given while [Baird's] bid on the larger contract is still revocable at will." See also § 200 n. 39.

¹⁴ 1 Williston, *Contracts* § 139 n. 25 (rev. ed., 1936).

¹⁵ *Contracts—Promissory Estoppel*, 20 Va. L. Rev. 214, 215 (1933): "In the instant case the plaintiff, because his case lay without the field of contract, as well as the field of tort, is allowed to suffer an obvious injustice without relief of any description."

to apply it."¹⁶ In a thinly disguised hypothetical illustration Llewellyn and the other draftsmen of the first proposed final draft of the Uniform Revised Sales Act comment that under their proposed firm offer section the offer in *Gimbel Bros.* would need no consideration to be irrevocable, "nor does the issue turn on what was the expected manner of acceptance." According to them, the issue is "whether the circumstances of consolidating a major bid on the last day reasonably and 'commercially' justify overlooking a mistake which runs to a half of what is as against the whole only one relatively minor item. That is for the trier of fact. If the reliance has been reasonable, it is of a kind and degree to bar revocation as a matter of law."¹⁷ In other words, the firm offer provision in the Code will remedy the *Gimbel Bros.* decision. Havighurst takes what appears to be a middle ground, preferring a rule permitting revocation of "firm offers" while recognizing room for protection of the reliance interest in offers for bilateral as well as unilateral contracts.¹⁸

Judicial comment on the *Gimbel Bros.* decision has taken issue not with the result but with the dictum that there was "no room for promissory estoppel" in the case of business offers for a bilateral contract. The Seventh Circuit, in *Robert Gordon, Inc. v. Ingersoll-Rand Co.* did not choose to "follow the Baird case. The mere fact that the transaction is commercial in nature should not preclude the use of the promissory estoppel."¹⁹ In *Northwestern Engineering Co. v. Ellerman* the South Dakota Supreme Court noted that the *Gimbel Bros.* opinion, "notwithstanding the eminence of its author, has been the subject of rather severe criticism . . . the last portion of the opinion apparently rejects the doctrine of promissory estoppel as applied to the transaction involved."²⁰

Assuming arguendo that there is room for a reliance doctrine in the enforcement of commercial as well as gift promises, the crux of promissory estoppel as restated in Section 90 is the reasonableness, definiteness and substantiality of the general contractor's reliance on the promise of the

¹⁶ 28 Ill. L. Rev. 419, 420 (1933). See also note on this case in 22 Minn. L. Rev. 843, 847 (1938) where the writer states that the dictum in *Gimbel Bros.* "which in effect would restrict the application of promissory estoppel to subscription and donation cases [seems] unwarranted, and this result certainly was not intended by the draftsmen of Section 90." See also note, 36 Ill. L. Rev. 187, 196-97 (1941).

¹⁷ A.L.I., Uniform Revised Sales Act 123 (Proposed Final Draft No. 1, 1944).

¹⁸ Havighurst, Consideration, Ethics and Administration, 42 Col. L. Rev. 1, 24-25 (1942).

¹⁹ 117 F. 2d 654, 661 (C.A. 7th, 1941); noted in 36 Ill. L. Rev. 187 (1941); 9 Univ. Chi. L. Rev. 153 (1941); 20 Tex. L. Rev. 478 (1942).

²⁰ 69 S.D. 397, 408, 10 N.W. 2d 879, 883 (1943) rev'd on other grounds, 71 S.D. 236, 23 N.W. 2d 273 (1946).

subcontractor.²¹ To determine these criteria one must examine the cases subsequent to *Gimbel Bros.* in terms of (1) the words of the offer itself, (2) the intention of the subcontractor in making the offer, (3) the good faith of the general contractor in relying upon the offer, and (4) the proof of the general's actual and substantial reliance.

Gimbel Bros. itself is a nearly perfect illustration of firm offer language.²² There the offer was "absolutely guaranteed" until a reasonable time after the general contract was awarded, but, unfortunately, it was coupled with a condition about acceptance which precluded, in Judge Hand's view, the application of promissory estoppel. Had the offer stopped after the words "absolutely guaranteed" or similarly declared itself as "open" for a stated period or for such reasonable time as the general might need to notify the offeror after receiving the award of the general contract, it would have been the perfect case.²³ If, at the other extreme, the offer had been in terms of a "quotation" of prices, it is quite possible a court might have interpreted it as an invitation to the general to make the offer subject to the sub's final acceptance.²⁴ In between the two extremes of a "clean

²¹ Section 90 reads: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Rest., Contracts § 90 (1932).

²² A problem not considered here but closely related to the wording of the offer is the consequence of its being oral. If oral, will it fall within the interdiction of the sales section of the Statute of Frauds requiring a written memorandum signed by the party to be charged, the subcontractor? In *Gimbel Bros.*, which involved a simple sale of linoleum for a large sum of money, the answer clearly would have been "yes." Suppose, however, as is so often the case in construction work, the bid involves work and labor as well as materials, will it then fall within the Statute? There is some authority for the proposition that a bid for plumbing installation, e.g., will be said to differ from the ordinary contract of sale and that the Statute will be narrowly construed not to apply, but it is difficult to understand why a sales transaction which is important enough to require a writing should become less important when the sale is coupled with the work of installation. Cases which have so held are: *Raff Co. v. Murphy*, 110 Conn. 234, 147 Atl. 709 (1929); *Bradley Supply Co. v. Ames*, 359 Ill. 162, 194 N.E. 272 (1935); *Town of Saugus v. Perini & Sons*, 305 Mass. 403, 26 N.E. 2d 1 (1940). See 2 Williston, Contracts, § 509A n. 3 (rev. ed., 1936), 2 Corbin, Contracts § 476 n. 32 (1st ed., 1950).

²³ No case was found with offer language that "clean," to borrow a metaphor from Llewellyn.

²⁴ See *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F. 2d 654 (C.A. 7th, 1941), where the court refused to interpret a manufacturer's letter (in response to a general's telephone request for information) tabulating "the vital information for making the necessary quotation" for air conditioning equipment as the language of an offer. Here the quotation, which was one of two received on the equipment, was used by the general in figuring his bid, and the contract was subsequently awarded to him. It appeared, moreover, that Ingersoll-Rand had intended its figure as the price of one unit, whereas Gordon claimed that he understood it as the price of the two units called for by the specifications. Gordon learned of his misinterpretation from a competing contractor after the contract was awarded, but he nevertheless sent a letter of acceptance at the stated price "quoted to include the two machines." Upon Ingersoll-Rand refusing to perform on this basis, Gordon brought an action for breach of contract. In re-

firm offer" and a "mere invitation to bid" lie a number of fact patterns which are reflected in the cases. The offer may say nothing about a time limit and yet be understood as firm.²⁵ The offer may present some question

versing the district court's judgment for Gordon, Judge Kerner, speaking for the Seventh Circuit, refused to interpret the "quotation" as an offer to sell despite Gordon's introduction of considerable evidence that it was trade usage to rely on such information in making up a bid. The court was not satisfied of the existence of a uniform trade usage. Furthermore, the court took the position that, even were it an offer, no reasonable general contractor would have interpreted it as being the price of two units. In other words, Ingersoll-Rand's mistake, if it were a mistake, was "palpable." Finally, even assuming arguendo that Ingersoll-Rand's quotation was an offer and Gordon was reasonable in understanding it as a price for two machines, since Gordon had notice of the mistake before he attempted acceptance, he could only bind the manufacturer by an argument of promissory estoppel: that he had "unalterably changed" his position by reliance. Here Judge Kerner parted ways with Judge Hand, as we have seen, on the applicability of promissory estoppel to commercial transactions, but nevertheless found that Gordon had failed to prove "irreparable detriment."

²⁵ See *Albert v. R. P. Farnsworth & Co.*, 176 F. 2d 198 (C.A. 5th, 1949), noted in 21 *Miss. L.J.* 281 (1950), reversing *R. P. Farnsworth & Co. v. Albert*, 79 F. Supp. 27 (E.D. La., 1948), noted in 62 *Harv. L. Rev.* 693 (1949), 23 *Tul. L. Rev.* 286 (1948). The offer was in the following terms: "We propose to furnish labor and material for the furring, lathing and plastering, as shown by drawings and specifications prepared by Bodman & Murrell, architects, for the Medical and Personnel Bldg. for Ethyl Corp., located at Baton Rouge, La., delivery terms:..... for the sum of Twenty-two thousand and four hundred fifty dollars (\$22,450.40) and forty cents." Transcript of Record at 148-49, *Albert v. R. P. Farnsworth & Co.*, supra.

Farnsworth, a general contractor, preparing to bid on the Ethyl Plant at North Baton Rouge, Louisiana, had invited bids from several plastering subcontractors. Farnsworth, believing Albert's written proposal to do the work for \$22,500 too low to be correct, suggested to Albert on the telephone that he review it. Albert did and subsequently added \$1500 to his proposal, making the total \$24,000. Since this was still the lowest proposal Farnsworth received, it used these figures in computing its general bid, which was informally accepted by Ethyl Corporation on August 10. On August 19 Albert stated he wished to withdraw his bid, but Farnsworth refused to consider Albert's request. On August 27 Ethyl Corporation entered into a formal contract with Farnsworth and on the same day Farnsworth formally, by telegram, accepted Albert's proposal. When Albert refused to enter into a formal contract, Farnsworth called for new bids and of the two submitted accepted the lower, a bid for \$30,500—\$6500 higher than Albert's bid, for which difference Farnsworth then sued Albert. The district judge, in giving judgment for plaintiff Farnsworth, pointed out that the defendant Albert was thoroughly familiar with the practices and customs of the building construction business in the city of Baton Rouge, he knew his bid was the lowest received, and he might expect his proposal to be used by Farnsworth in preparing his Ethyl bid. Placing considerable reliance on a recent Louisiana case, *Harris v. Lillis*, 24 So. 2d 689 (La. App., 1946), noted in 7 *La. L. Rev.* 147 (1946), the judge stated that it was clearly the law of Louisiana which controls here, that once the bid of the general contractor is accepted by the owner, it is too late for the subcontractor to withdraw his bid, and the general has a reasonable time after the award in which to call upon the subcontractor to perform.

But Judge Hutcheson, speaking for the Fifth Circuit, reversed the district court. First, he disposed of Farnsworth's argument that the decision was governed by the pertinent articles of the Louisiana Code by pointing out that the case was not tried or decided with those articles in mind. Second, he distinguished *Harris v. Lillis*, on the ground that in that case the general had formally mailed an acceptance before the subcontractor attempted a withdrawal, and hence the court's remarks about custom in the building trade in New Orleans were gratuitous. His third ground for reversal was that the custom claimed here was not pleaded, and "came in only as an afterthought suggested by questions . . . on an entirely different matter," and such evidence as plaintiff then proceeded to introduce through opinion witnesses did not

as to its completeness.²⁶ Of course, the offer may itself be a completed agreement which fails as a contract for some technical reason; here there is good reason for interpreting it to be at the very least a firm offer.²⁷

"show a general and reasonable custom understood by all in trade in the same way, general contractor and subcontractor alike." 176 F. 2d 198, 201-202 (C.A. 5th, 1949).

Judge Hutcheson, however, left the door open on re-trial for the plaintiff to prove custom or practice in so far as it might be relevant to determining whether the pertinent articles of the Louisiana Civil Code required Albert's offer be kept open a "reasonable time" or for Farnsworth "to communicate his determination."

The value of the Farnsworth opinion as a representative judicial approach to the firm offer problem is not marred by the locale of the transaction inasmuch as neither the trial nor the appellate court relied on the atypical Louisiana civilian rules on the duration of an offer. Moreover, the Louisiana case chiefly relied on (*Harris v. Lillis*) made no reference to the Code but based its dictum on local custom just as did the trial judge in the Farnsworth case.

²⁶ Obviously, the bid must contain the essentials of the bargain, such as price, quantity, quality, etc. or the omnibus phrase, "according to the plans and specifications," but must an offer follow a standard form of proposal if it is generally used in the trade? Probably not. It has been argued that where a trade association has recommended a standard form contract which is widely used in the trade that nothing less than this form will satisfy the making of a contract. In *Traff v. Fabro*, 337 Ill. App. 83, 84 N.E. 2d 874 (1949), the Illinois Appellate Court refused to accept the subcontractor's evidence of universal custom or usage in the terrazzo trade requiring the execution of a formal contract and held that the plans and specifications adequately covered the details of the bargain between the parties. See note 54 *infra*.

²⁷ See *Northwestern Engineering Co. v. Ellerman*, 69 S.D. 397, 10 N.W. 2d 879 (1943), noted in 28 Minn. L. Rev. 283 (1944), *rev'd* on other grounds, 71 S.D. 236, 23 N.W. 2d 273 (1946), where *Northwestern Engineering*, preparing to put in a bid to the U.S. Engineers for construction of a portion of the Rapid City Air Base project, entered into a signed (and witnessed) contract with *Ellerman* to put in the sewer system in the event the work was awarded to *Northwestern*. The contract was quite detailed as to quantities, prices, time of payment, liquidated damages for failure to complete work within the contract time limit, and allocation of incidental expenses such as workmen's compensation, property damage, public liability insurance and social security taxes. *Ellerman* put up a bidder's bond guaranteeing a 100% performance bond would be furnished upon execution of a formal contract. Subsequently, the parties modified the agreement by an increase of 15% per foot. Relying on the signed agreement *Northwestern* filed its bid with the Government and it was accepted, but thereafter *Ellerman* refused to perform. The trial court dismissed *Northwestern's* complaint for failure to state a cause of action. Reversing, the South Dakota Supreme Court agreed with the trial court that the written agreement lacked consideration because *Northwestern* was not bound to submit a bid on the airbase project, but held *Ellerman* on the basis of promissory estoppel (though admitting *Northwestern* had not argued it on appeal). See p. 243 *supra*.

The *Ellerman* opinion is unique on several points. First, the court seems wrong in its conclusion that *Ellerman* received no consideration for its promise to do the work. With little difficulty the court could have spelled out from *Northwestern's* express promise to pay at stipulated pay periods an implied promise to give *Ellerman* the job on condition it was awarded the contract. The fact that this promise was itself conditional on the contingency of the award does not make it illusory according to the accepted view. Cf. *Raff Co. v. Murphy*, 110 Conn. 234, 197 Atl. 709 (1929), where the court held that the general's promise to give the sub the work was not insufficient consideration because it was conditional on the general obtaining the engineers' consent that the sub do the work. 1 Corbin, *Contracts* § 148, n. 64 (1st ed., 1950). Second, the reliance by *Northwestern* was here unquestioned. Unlike *Gimbel's*, where the general presumably had a number of subbids on linoleum to choose from, or *Ingersoll-Rand*, where the general had two, here the general based its bid entirely on the one bid from *Ellerman*, and in fact went so far as to execute a formal, detailed contract and to require a bid bond.

No matter how objective a court may pretend to be in weighing the language of an offer, it will not overlook surrounding circumstances which throw light on the intention of the offeror. Suppose, for example, Baird had advised Gimbel that its bid was very low and Gimbel's, after reviewing it, had reaffirmed its correctness (before sending notice of revocation). Undoubtedly, such a reaffirmation would reinforce Gimbel's intention to guarantee the bid.²⁸ Or suppose there was evidence that Gimbel's had protected itself by ordering materials for the job. This again would buttress Gimbel's intention to keep the offer firm; in fact, it would not be an illogical inference that Gimbel's knew its bid had been used and assumed it had the job.²⁹

Balanced against the motives of the subcontractor in making his bid is the good faith of the general in relying on it. The element of mistake loomed large in at least one of the cases, weighing the scales in favor of the sub.³⁰ If Baird, as a reasonable contractor, should have recognized Gimbel's fifty percent mistake, either by reason of his business experience or by comparison with other bids on the same item, then under traditional mistake doctrine it would have been unconscionable for Baird to have taken advantage of it without giving Gimbel a chance to re-figure.³¹

²⁸ In *R. P. Farnsworth & Co. v. Albert*, 79 F. Supp. 27, 28 (E.D. La., 1948), rev'd, 176 F. 2d 198 (C.A. 5th, 1949), an estimator employed by the plaintiff general contractor called the defendant subcontractor on the telephone, told him his figure was low and suggested that he review it. This the sub did and subsequently added \$1550 to his proposal. Nevertheless, the Fifth Circuit permitted the sub to withdraw with impunity.

²⁹ In the trial of *R. P. Farnsworth & Co. v. Albert*, 79 F. Supp. 27 (E.D. La., 1948), counsel for the plaintiff general put on the witness stand a supplier who testified both from his independent recollection and by producing records signed by the sub, that on a date prior to the withdrawal of the bid the sub had ordered from him certain materials which he stated were to be used on the Ethyl job, and he further showed that these materials were shipped to and received by the sub. Transcript of Record at 89-92, 99-107, *R. P. Farnsworth & Co. v. Albert*, supra. The sub vigorously denied on the witness stand that he had protected himself in this manner. Neither the district nor the circuit court ruled on this evidence.

³⁰ *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F. 2d 654 (C.A. 7th, 1941), where it is quite clear that the court thought that, assuming the manufacturer had made a mistake in its quotation, a reasonable general contractor should have detected it.

³¹ In his recent casebook, Professor Fuller notes that "Gimbel actually relied on two defenses: (1) its offer was withdrawn before it was accepted; (2) its offer was based on a mistaken computation of such proportions that Baird ought to have known of the mistake. . . . The evidence on the issue of mistake was in such a state that it was difficult for the court to deal with it. The bid on the total job was about \$2,000,000; Baird had to submit a \$50,000 check with its bid. Gimbel's bid on the linoleum was about \$15,000; other bids for this part of the job ran from about \$29,000 to \$32,000. Of the twenty-five odd general contractors to whom Gimbel sent bids on the linoleum, three or four called to say that there must have been some mistake in Gimbel's bid. It appeared that their concern was not so much for Gimbel as for themselves; they feared that other general contractors would not notice the discrepancy in the linoleum bids and might therefore make a lower bid for the whole job, based on Gimbel's low bid on the linoleum. An expert called by Gimbel admitted that variations of as

Again, if Baird had called the discrepancy to Gimbel's attention, it would negative any possible bad faith on Baird's part.³²

Good works alone are not enough. The general must prove his actual and substantial reliance on the sub's bid. Some proof of reliance can be found in the inclusion of the exact bid in the general estimate.³³ Better proof is evidence that the general not only used the bid as a partial basis for his total bid but that he had no intention of negotiating with the sub for a better price or of "shopping"³⁴ for a cheaper bid from another sub after the general contract was awarded. But the latter is extremely difficult to demonstrate because revocation either occurs shortly before the award as in *Gimbel Bros.*, or shortly thereafter.³⁵ If, as rarely happens, the general has taken pains to enter into a detailed, conditional agreement before the award which fails because of some technicality, the court has good reason for finding sufficient reliance.³⁶

Suppose the general has time to withdraw his bid before the deadline

much as fifty percent were not unusual in bids on subcontracts for linoleum, but also testified that mistakes were very common. Baird's estimator testified that he had little time in which to prepare the bid on the whole job, and that he did not calculate the footage of linoleum required. He testified that Gimbel was the most responsible of the subcontractors offering to do the linoleum work, and that he depended on Gimbel to determine the footage correctly. Gimbel's witnesses were unable to explain satisfactorily just what mistake had been made by them, but assumed it must have consisted in leaving out whole floors of the building." Fuller, *Basic Contract Law* 376 (1947).

³² See note 28 *supra*. Another situation which would cancel out any bad faith on the part of the general, though it might not legally excuse him from performing, would be where the awarding authority refused to permit the general to award the bid to the sub because he was not acceptable. Cf. *Fast v. Shaner*, 183 F. 2d 504 (C.A. 3d, 1950), where the general contractor who had made a contract with the sub conditional on his being awarded the general contract was unsuccessful in arguing impossibility on the ground that the owner refused to accept the sub. The court made the obvious point that a contractor may promise to do the impossible.

³³ In the district court opinion in *R. P. Farnsworth & Co. v. Albert*, 79 F. Supp. 27 (E.D. La., 1948), *rev'd*, 176 F. 2d 198 (C.A. 5th, 1949), counsel for the general introduced as an exhibit the general's estimate sheet which not only contained the subcontractor's revised figure but also noted the subcontractor's name alongside. Exhibit Sutter 2, Transcript of Record at 202, *R. P. Farnsworth & Co. v. Albert*, *supra*.

³⁴ "Bid shopping" in this article is used generically to include trade practices variously described as "bid peddling," "bid cutting," "second flight bidding," or "backing in" on previously bid jobs. It is practiced not only by the general, who, having used the lowest acceptable bid to secure the general contract, reopens the bidding after the award and "shops" for a better price, but by the sub who "peddles" a bid lower than his original bid to the general after the award and prior to the making of the subcontract. Thus, in the trade it is a term of opprobrium directed not only against generals but against fellow subs.

³⁵ See, e.g., *R. P. Farnsworth & Co. v. Albert*, 79 F. Supp. 27 (E.D., La. 1948), *rev'd*, 176 F. 2d 198 (C.A. 5th, 1949), where the sub withdrew about a week after the informal award of the general contract.

³⁶ *Northwestern Engineering Co. v. Ellerman*, 69 S.D. 397, 10 N.W. 2d 879 (1943), *rev'd* on other grounds, 71 S.D. 236, 23 N.W. 2d 273 (1946).

for filing, and thus prevent the loss occasioned by the sub's withdrawal, will his failure to do so constitute an unreasonable reliance? The answer depends on a number of variables: (1) assuming the general has put up a security deposit, can he recover it; (2) if he withdraws, will he have time to resubmit a revised bid; (3) if he does not have time to resubmit, is it too much of a hardship to expect him to lose the chance he had of being awarded the contract; and (4) even if he can recover his deposit, is it too much of a hardship to expect him to lose business prestige for having pulled out? The courts which have considered the question have not come up with uniform answers.

Before the award it is clear that the general contractor can recover his deposit on simple withdrawal-of-offer principles.³⁷ But once the contract has been awarded to him the bid is considered irrevocable. As a matter of fact, one case held that the deposit was not exclusive, liquidated damage and permitted the awarding authority to recover additional actual damages.³⁸ Where, however, the bid is withdrawn after it has been opened but before award is formally made, the general has been permitted to recover his deposit.³⁹ Of course, the general can even recover by making a demand shortly after the formal award where the awarding authority should have known of the mistake.⁴⁰ In *Ingersoll-Rand* the court discounted the general's reliance partly on this authority.⁴¹

Even if the general must forfeit his deposit, should he have mitigated damages by so doing or is this too stringent a duty to place upon him, considering his other losses in potential profits and goodwill? The Connecticut Supreme Court has made an apt reply:

³⁷ *State Highway Dept. v. MacDougald Construction Co.*, 54 Ga. App. 310, 187 S.E. 734 (1936).

³⁸ *Middleton v. City of Emporia*, 106 Kan. 107, 186 Pac. 981 (1920).

³⁹ *Younglove v. Hoberg*, 195 Iowa 281, 191 N.W. 985 (1923). Cf. *Gregory Ferend Co. v. State*, 251 App. Div. 13, 295 N.Y. Supp. 715 (1937) (based on New York State building statute prohibiting withdrawal of a bid after its submission).

⁴⁰ *R. O. Bromagin & Co. v. Bloomington*, 234 Ill. 114, 84 N.E. 700 (1908).

⁴¹ *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F. 2d 654, 661 (C.A. 7th, 1941), where the Bromagin case was cited to prove in part that the general contractor had failed to show irreparable detriment. In *Ingersoll-Rand* the awarding authority's agent upon learning of the general's mistake had offered to help him get out of his bid because he did not think that the awarding authority (the University of Illinois) wanted to take advantage of a man who had made an obvious mistake in preparing his bid. The general's answer was that this would not be the proper thing to do, and moreover it might injure his reputation as a bidder. An Indiana Appellate Court went about as far as a court can go in permitting a mistaken general contractor to recover his good faith deposit after the award not on the ground of palpable mistake but on the subjective theory that there was no "meeting of the minds" since the general did not intend to contract on the basis of his actual low bid. *Board of School Comm'rs v. Bender*, 36 Ind. App. 164, 72 N.E. 154 (1904).

The specifications also required that a certified check for 1% of the bid price should accompany each proposal as a guaranty of good faith, and, prior to the acceptance of the bid, the plaintiff could have withdrawn it by sacrificing the amount of this check; but, had it done so, it would have been guilty of a breach of business ethics, and would have had the reputation of being a firm whose bids could not be relied on, to its damage if not to its destruction. . . . The duty of the plaintiff to keep the damages from the breach of the defendant's contract as low as reasonably possible does not require of it that it disregard its own interests or exalt them above those of the defaulting defendants.⁴²

A corollary fact discounting reasonable reliance would be any delay on the general's part in accepting the bid after the award. Initially, it is important to examine the wording of the bid. Does it call for immediate acceptance or acceptance within a stated time period, and if so, has there been a waiver by the sub?⁴³ Even if there is no time stipulation, the general must accept within a reasonable time, and this means long before the sub is to go to work.⁴⁴ If his particular job, plastering or painting, for example, comes near the end of the construction job, the sub cannot be expected to underwrite the fluctuations in the market price.⁴⁵

Reliance can be a two-way street. Suppose, to reverse the facts of the case, Gimbel's had included in its telegraphic offer a sentence reading: "If our estimate used wire us collect prior to December 30 or else same is withdrawn." Suppose, further, Baird had wired on December 28: "We used your bid for linoleum," and then, after having been awarded the contract, Baird awarded the linoleum contract to another bidder. Would Gimbel's now have any remedy against Baird?⁴⁶ Under the traditional

⁴² *Raff Co. v. Murphy*, 110 Conn. 234, 243, 147 Atl. 709, 712 (1929). See 5 Corbin, *Contracts* § 1042 n. 56 (1st ed., 1950). Cf. *James Baird Co. v. Gimbel Bros., Inc.* 64 F. 2d 344 (C.A. 2d, 1933), where the general made a comparable argument but the court failed to comment upon it.

⁴³ See *McAlister v. Klein*, 81 Okla. 291, 198 Pac. 506 (1921), where the proposal was made for "immediate acceptance" but the subcontractor gave the general an additional ten days in which to accept, which the court held to be a waiver.

⁴⁴ *Clore v. Zimmerman*, 262 Mich. 268, 247 N.W. 177 (1933).

⁴⁵ *Ibid.* Short of an overt acceptance the best proof of the general's actual and substantial reliance on the sub's bid would be the established usage in the trade to so consider it. A detailed consideration of this type of evidence is postponed until p. 252, *infra*.

⁴⁶ This hypothetical is a paraphrase of *Williams v. Favret*, 161 F. 2d 822 (C.A. 5th, 1947) [opinion by Judge Hutcheson who also wrote the opinion in *Albert v. R. P. Farnsworth & Co.*, 176 F. 2d 198 (C.A. 5th, 1949)]. There, Williams, a Mississippi electrical subcontractor, had been invited by Favret, a New Orleans contractor bidding on a navy contract at Gulfport, Mississippi, to submit a quotation on the electrical work. Williams submitted his bid to several generals, including Favret, with the closing statement: "If our estimate used wire us collect prior to June 6 or else same is withdrawn." Favret and another contractor wired Williams that his bid had been used, Favret's wire reading: "June 6. We used your bid for wiring on the

view Gimbel would not have a contract because Baird's responsive wire was something less than acceptance; it might be interpreted as sufficient consideration to Gimbel to give Baird an irrevocable option to accept until a reasonable time after the award, but nothing more.⁴⁷ This, despite difficulties in understanding why the sub would confer such a gratuitous benefit on the general without expecting a conditional contract in return.⁴⁸

If the subcontractor could not recover his expectation damage, could he at least be reimbursed for his reliance? Suppose, for example, Gimbel's had spent \$100 in estimating the linoleum bid; would this be recoverable? Probably not, on the theory that no contract could be implied because the general would not reasonably expect to compensate an unsuccessful subbidder for his estimating expenditures nor would the bidder reasonably

barracks and dispensary Gulfport." Subsequently, Favret was awarded the general contract and awarded the electrical subcontract to another bidder. Affirming the district court's directed verdict for the defendant Favret, the court refused to interpret Favret's telegram as an acceptance of Williams' offer. Judge McCord, dissenting, pointed out that Williams knew Favret's overall bid would be opened along with others at 11 A.M. on June 6 and that he was not willing to have his bid hanging in mid-air but wanted to have it rejected or accepted prior to the submission of the general's bid. Favret, an experienced contractor, understood this qualification of Williams' bid and to protect himself, accepted the bid conditional, of course, on his being awarded the contract. Moreover, when Williams learned that Favret had been awarded the contract, he set about ordering supplies and making arrangement to carry out his end of the work. When Favret several weeks later advised Williams that he had given the work to someone else, he gave as his reason that "your bid . . . was found to be incomplete." But, as Judge McCord adds, "the bid was not incomplete and Favret had not previously complained. Indeed, Williams' bid was used by Favret as a basis in the general bid, which was accepted by the government. The excuse that the bid was incomplete is but an obvious afterthought excuse for avoiding a solemn agreement. The fact is that Favret, after accepting Williams' bid, shopped around and found that he could get someone else to do the work at a lower price."

Judge McCord quoted testimony of Favret's son (his apparent agent) which proved that Favret had sent the wire on June 6 to hold Williams to his bid. The judge could not see how Williams could be bound and Favret left free to do as he pleased. Borrowing a phrase from Judge Hutcheson, Judge McCord quipped: "I know of no such one-sided application, horn-book or otherwise, of the law of contracts. . . . If the exchange of telegrams did not establish offer and acceptance, what was their purpose and meaning?"

⁴⁷ This is the interpretation which Corbin puts upon *Williams v. Favret*, 161 F. 2d 822 (C.A. 5th, 1947). 1 Corbin, *Contracts* § 24 n. 11 (1st ed., 1950): "In spite of a vigorous dissent, it is believed that the court's decision that the defendant had committed no breach of contract was correct. If the plaintiff's 'quotation' of a price was in fact an offer, the defendant's 'use' of it in making his own bid was not an acceptance. It was not so in express terms; and such an implication is not reasonable. The defendant's 'use' of the estimate in making his own bid did no more than to prevent its being 'withdrawn.' Such action in reliance, in view of the plaintiff's express words, might well be held to make an offer irrevocable, in accordance with *Restatement, Contracts*, § 90. Doubtless it should also have weight in interpreting the plaintiff's submission of an estimate as a firm offer and not a mere 'quotation' of a price." See also 3 Corbin, *Contracts* § 534 n. 8 (1st ed., 1950).

⁴⁸ See Judge McCord dissenting in *Williams v. Favret*, 161 F. 2d 822, 824 (C.A. 5th, 1947).

expect compensation. A recent Washington Supreme Court case suggests the opposite conclusion but the reasoning is highly questionable.⁴⁹

Evidence of Business Usage

The extreme difficulty of proving actual detrimental reliance on a subcontractor's bid by individual acts has led counsel for several general contractors to attempt to introduce evidence of accepted business usage in the local area. Generally, the testimony has been that of the expert witness, either an experienced and reputable general or subcontractor, an officer of a manufacturing company, or an officer of a trade association.

The stock question put to the opinion witness is: "Will you please tell

⁴⁹ *Western Asphalt Co. v. Valle*, 25 Wash. 2d 428, 171 P. 2d 159 (1946), noted in 22 Wash. L. Rev. 139 (1947), 42 Ill. L. Rev. 259 (1947). Here the subcontractor was successful. Upon learning of attractive construction jobs to be let, Western Asphalt had the practice of making its estimates on the soil stabilization and asphalt pavement work and making such estimates available to any reputable general contractor who requested them. Though Western Asphalt never charged for this engineering service, it had always received the subcontract when the general to which it furnished the data was successful. Western Asphalt followed this procedure on the Tacoma Naval Base Advance Depot job, the largest project with which it had ever been concerned, and spent considerable time and money preparing its \$294,000 estimate. On the afternoon before the deadline for filing the general bid it furnished copies of its estimate to each one of the seven or eight general contractors who expected to bid on the job. Early the next morning the president of Western Asphalt received an urgent call from the estimator of Valle, another general preparing a bid for the 11 A.M. deadline, requesting Western Asphalt's estimate. The president permitted Western Asphalt's secretary to read the figures over the telephone to Valle's estimator. Valle used these figures, obtained the contract, and told Western Asphalt he had used its estimate and to see "Allison [Valle's estimator] on Monday and he will take care of you." Shortly thereafter Valle discovered he had omitted the \$40,000 item on soil stabilization from the total. When Western Asphalt refused to share Valle's loss, Valle gave the job to another subcontractor. Western Asphalt then sued Valle for the value of its services in computing the estimate, which it set at \$43,000, the profit it expected to make on the subcontract. Western Asphalt proved it had paid \$75 for an outside estimate and that three executives of the company had spent several days preparing the bid. The jury came in with a verdict for defendant Valle, which the trial judge set aside on the ground it was contrary to the evidence and substantial justice had not been done. The Supreme Court of Washington affirmed the order for a new trial, stating, 25 Wash. 2d 428, 441-42, 171 P. 2d 159, 166-67 (1946): "The fact that respondent hoped to obtain a subcontract from the general contractor to whom the work might be awarded, and that with this idea in mind respondent made available to appellant its figures and computations concerning that portion of the general contract in which respondent was interested, is not necessarily inconsistent with its expectation that it would be entitled to receive reasonable compensation for the service rendered if appellant was awarded the construction contract and did not award respondent the subcontract which respondent desired. We are not in accord with the view that such services rendered in connection with a contemplated contract and with the hope of obtaining a benefit from such contract are necessarily not so rendered in expectation of compensation. In the case at bar the evidence on this phase of the case presents a question to be determined by the trier of the facts."

Query: how can the sub maintain "such services rendered in connection with a contemplated contract and with the hope of obtaining a benefit from such contract are . . . rendered in expectation of compensation" in face of the established custom in the building trade that subcontractors never charge for their estimates but enter it as a major item of overhead? Or does use of the phrase, "the established custom in the building trade," beg the question? But cf. *Stubner v. Raymond*, 17 La. App. 216, 135 So. 676 (1931).

us what custom, if any, prevails in the building trade in relating to the withdrawal of bids made by subcontractors?"⁵⁰ The answers vary widely. As Judge Hutcheson observed in the *Farnsworth* case, one witness testified the custom to be that the sub cannot withdraw after he makes his bid, a second testified that the bid is irrevocable after it is "used" and a third "couldn't say that there is any custom established."⁵¹ Moreover, the third witness testified on cross-examination that there were occasions when he did not give a contract to the low bidder, and when in fact he persuaded the low bidder to reduce his bid.⁵²

The pitfalls into which expert witnesses may be led on cross-examination were laid bare in *Ingersoll-Rand* where a witness for the plaintiff general who testified that it was the custom "to ask material dealers and manufacturers for quotations . . . [which] quotations were considered firm prices that you could use. . . . [and if] you were successful in securing the work, these proposals were considered to be the prices for which the material could be purchased," on cross-examination admitted "that contractors do not always buy from manufacturers whose prices they used in making up their bids and that they try to get the best price from the manufacturer."⁵³

To be compared with the general contractor's attempted proof of trade usage as a basis for reasonable reliance is the trade usage introduced by a subcontractor as defendant to prove that no formal contract was made with the general.⁵⁴ Introduction of a previous course of dealing be-

⁵⁰ *Albert v. R. P. Farnsworth & Co.*, 176 F. 2d 198, 201 n. 8 (C.A. 5th, 1949).

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F. 2d 654, 658 (C.A. 7th, 1941); the witness added: "It is true in some cases, and in some cases it is not, that there is a period of negotiation between the time we have made our bid to the job and the time we send in an order and we ask for and get a better price. . . ."

⁵⁴ For instance, in attempting to upset a contract which had been made informally the defendant subcontractor in *Traff v. Fabro*, 337 Ill. App. 83, 84 N.E. 2d 874 (1949), testified that "there was a general and universal custom in Cook County for twenty years among terrazzo contractors and general contractors, requiring general contractors to 'automatically make up the contract' which is submitted to the subcontractor covering details not provided for in the proposal and acceptance, such as the terms of payment, insurance, kinds of materials, glass breakage, general cleaning, use of hoisting apparatus, water, light, heat and other items." *Ibid.*, at 86, 876. But also testifying on behalf of the subcontractor, an officer of the National Association of Terrazzo Contractors stated "that the association provides a standard form for its members . . . for their use in making up contracts with general contractors . . . and that 'the custom is that the terrazzo man furnishes the form upon which the contract is made.'" *Ibid.*, at 87, 876. Again, witnesses on the same side were caught in a net of contradiction as to what was the established practice and the argument fell. Despite the lack of success of the subcontractor in the *Traff* case to prove the necessity for using a standard form contract, there are cases which recognize the existence of such a custom. In *El Reno Wholesale Groc. Co. v. Stocking*, 293 Ill. 494, 127 N.E. 642 (1920), the court held that it was the custom in the

tween the general and the sub to prove that the general usually contracted in greater detail and with more formality than in the case under consideration is another weapon in the defendant subcontractor's arsenal.⁵⁵

These attempts at proof have been abortive. Such singular lack of success may perhaps be attributed to the traditional position American courts have taken toward trade usage, well illustrated in Section 249 of the *Restatement of Contracts*:

Illustration 2. A makes B a promise not supported by sufficient consideration. There is a usage assented to by both parties to regard promises like A's as binding without consideration. A's promise is not binding.⁵⁶

American courts have exhibited a great reluctance to permit the introduction of trade usage and previous dealings for any purpose other than interpreting a contract. The general notion seems to be that custom and usage may neither create nor void a contract. In the above attempts, only two courts, one of which was reversed, accepted the argument that usage could replace "acceptance," and both were located in Louisiana where the Code leans toward the firm offer.⁵⁷ Perhaps the best judicial statement is the dictum in *Harris v. Lillis* that "in accordance with the custom prevailing in the building trade in New Orleans an offer by a subcontractor

wholesale grocery business throughout the United States for a formal written contract to be prepared by the seller covering the entire details of the transactions which would be submitted to the buyer, which he might or might not sign; hence the court refused to recognize the contract made by memoranda or sales notes prepared by the broker for both parties.

⁵⁵ For example, in *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F. 2d 654 (C.A. 7th, 1941), the defendant manufacturer presented evidence that the general had previously negotiated a contract for the same kind of refrigerating machinery by sending an order to the defendant manufacturer which was subsequently accepted. This order was not sent in until after the plaintiff general had been awarded the contract for the job. *Ibid.*, Defendant Appellant's Reply Brief at 29-30. Again, in *Harris v. Lillis*, 24 So. 2d 689 (La. App., 1946), noted in 7 La. L. Rev. 147 (1946), the subcontractor testified that in previous dealings the general had never signed and returned any estimates the sub had submitted but had indicated its acceptance by oral instruction to the sub and then only given a few days before the building was ready to be roofed. He further testified that the general would select the subcontractor from among the bidders after having secured the general contract. Defendant Appellant's Brief at 9-10, *Harris v. Lillis*, *supra*.

⁵⁶ Or as 3 Williston, *Contracts* § 655 (rev. ed., 1936), puts it: "Parties cannot effectively agree that a parol promise shall be binding without consideration, and the fact that a community or group of persons is accustomed to act as if such promises were binding will make no difference."

⁵⁷ The district court in *R. P. Farnsworth & Co. v. Albert*, 79 F. Supp. 27 (E.D. La., 1948), *rev'd*, 176 F. 2d 198 (C.A. 5th, 1948); and the Louisiana Court of Appeals in *Harris v. Lillis*, 24 So. 2d 689 (La. App., 1946). Compare UCC § 1-205, Comment 4 (Text and Comments ed., Spring 1950), which "expresses its intent to reject those cases which see evidence of 'custom' as representing an effort to displace or negate 'established rules of law.'"

to a general contractor to do work is irrevocable after the contractor has used the estimate as a basis for his offer to the owner and the owner has accepted the general contractor's bid."⁵⁸ No explanation is given why the custom replaces the rule of offer and acceptance. On the other hand, in the *Ingersoll-Rand*, *Farnsworth* and *Traff* cases the judges refused to listen to the arguments of trade usage. The chief difficulty that counsel had was an inability to prove that the usage was certain, general and known to both the parties. Cross-examination upset the certainty in both the *Ingersoll-Rand* and the *Farnsworth* cases. In *Ingersoll-Rand*, which undoubtedly was the easier of the two cases for the purpose of proving trade usage since it involved the interpretation of an offer rather than an acceptance, one of the witnesses under cross-examination made the usage seem quite uncertain and doubtful by observing that contractors do not always buy from manufacturers whose prices they used in making up their bids and that they try to get the best price from the manufacturer. In the *Farnsworth* case Judge Hutcheson pointed out that the testimony in the record failed to "show a general and reasonable custom understood by all in the trade in the same way, general contractor and subcontractor alike. It presents the varying views of three general contractors."⁵⁹

In the *Traff* case the Illinois Appellate Court objected to the testimony of the trade association officer put forward by defendant subcontractor on the ground that it did not "show that the plaintiff [general contractor] had knowledge of the existence of the alleged usage or custom [the standard form contract] nor does it appear that he had any prior transactions from which it might be inferred that he had such knowledge."⁶⁰

Both the Fifth and the Seventh Circuit Courts made further objection to the introduction of trade usage because the alleged usage, if accepted, was highly unreasonable. In *Ingersoll-Rand* the court said:

We consider this usage strict and even onerous in character, for in effect it compels a manufacturer who merely desires to impart information to prospective customers, to exclude the operation of the usage in express terms.

Ordinarily parties trading in a particular market are presumed to know the general or uniform usages prevailing in that market, and these usages enter into their agreements. . . . However, courts are less willing to assume that this knowledge or duty to know exists, where the evidence of usage is not entirely satisfactory. Espe-

⁵⁸ *Harris v. Lillis*, 24 So. 2d 689, 691 (La. App., 1946).

⁵⁹ *Albert v. R. P. Farnsworth & Co.*, 176 F. 2d 198, 201 (C.A. 5th, 1949). Compare UCC § 1-205, Comment 5 (Text & Comments ed., Spring 1950) which recognizes trade usages "currently recognized" by the great majority of decent dealers as 'established,' even though dissidents ready to cut corners do not agree."

⁶⁰ *Traff v. Fabro*, 337 Ill. App. 83, 88, 84 N.E. 2d 874, 877 (1949).

cially is this true where the usage imposes an appreciable restraint on one of the tradesmen or carries with it possible business consequences of a severe nature.⁶¹

In the *Farnsworth* case Judge Hutcheson was unwilling to accept the usage as law because of its lack of mutuality:

[T]his so-called custom establishes no rights whatever in the subcontractor, to receive the contract, but only in the contractor to accept or reject the subcontractor's bid or start new dealings with him, as to the contractor seems fit. A claimed general custom which is no better proved and which has no more mutuality than this is neither legal, reasonable, nor binding, as a custom.⁶²

The magnitude of the problem is summed up in an old book on *The Law of Usages and Customs*:

There are scarcely any questions which come before courts of law so difficult of decision as those involving customs. Here the Court has to deal with something which is vague and indefinite, which bears much similarity to law, but which yet comes before them, in the guise of evidence, which is not definitely written in books, but lives only in the breath of the public and the vague traditions of the actions of men. It requires not only legal learning but genius to deal with such cases, and it is not to be wondered at if many of the common law judges shrink from the task of exercising such an indefinite jurisdiction.⁶³

II. ATTITUDE SURVEY OF GENERALS AND SUBCONTRACTORS IN INDIANA

The infrequency of litigation over firm offers in the construction industry results in a very narrow and perhaps aberrational basis for analysis of the problem; the cases arise in different jurisdictions at different stages of the business cycle; the litigants differ in size and bargaining power; the decisions themselves often are circumscribed by procedural technicalities. About ten years ago Professor Malcolm Sharp suggested the desirability of a "systematic inquiry" to test the "hypothesis that American merchants would feel themselves legitimately annoyed by a free use of the

⁶¹ *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F. 2d 654, 659 (C.A. 7th, 1941). The court thought that it was unnecessary to comment on the question of whether or not a contract could be "made" by trade usage.

⁶² *Albert v. R. P. Farnsworth & Co.*, 176 F. 2d 198, 202 (C.A. 5th, 1949). Though counsel argued trade usage in both *Northwestern Co. Engineering v. Ellerman*, 69 S.D. 397, 10 N.W. 2d 879 (1943), rev'd on other grounds, 71 S.D. 236, 23 N.W. 2d 273 (1946); and in *Western Asphalt v. Valle*, 25 Wash. 2d 428, 171 P. 2d 159 (1946), neither opinion mentions usage as a basis for decision. In the *Western Asphalt* case the defendant general argued that the subcontractor admitted "[i]t was shown without contradiction to be the custom of subcontractors to furnish, and of general contractors to receive, these bids without any charge. To this effect we have Western Asphalt's testimony that they always prepared themselves to give bids and that they never charged a contractor for such services for bids. We also have the testimony of George Johnson, one of the largest and most experienced contractors in Seattle, also the testimony of Valle, and Allison, and Hill, and Hoyt." Appellant's Opening Brief at 44, *Western Asphalt Co. v. Valle*, supra.

⁶³ J. H. Balfour Browne, *The Law of Usages & Customs* 48 (Clarke's Am. ed., p. 93, 1881).

legal power" to revoke offers which either expressly or implicitly were designed to remain open for a specified time.⁶⁴ The suggestion struck the writer as challenging. A systematic national inquiry of the building segment of American business, however, presents an almost insurmountable task. The Associated General Contractors' directory lists 5500 general contractors as members (not to mention nonmembers) and the generals are far outnumbered by the subcontractors, materialmen and manufacturers. Even a fair sampling on the national level would be a large order. In addition, the written questionnaire has its limitations; the personal interview, such as opinion pollsters widely use, is a far superior method but is even more expensive and difficult for obtaining accurate results than the written questionnaire. Another drawback is that preferably such an inquiry should be prepared and conducted by a public opinion analyst rather than a law teacher. Despite these limitations, it was decided to experiment with a state-wide questionnaire survey of the two most important protagonists, the generals and the subs, in one state, Indiana. The basis for the survey was the 1950 directory of members of the Indiana General Contractors' Association. Specially prepared explanatory letters and questionnaires were sent during Spring, 1951, to the 137 listed generals and 275 listed subs in four representative trades: (1) electrical, (2) plumbing and heating, (3) sheet metal and roofing and (4) painting and decorating. Eighty generals and ninety-three subs responded. In addition, as a partial check on the questionnaire method, full scale personal interviews were conducted with five large generals and six large subcontractors in Indianapolis.⁶⁵

Questionnaire Survey of General Contractors

In the letter to the 137 generals the following problem was put:

Suppose, in the course of preparing a bid on a typical, large (\$250,000 or thereabouts) private, commercial job, you receive a "firm" proposal from an electrical subcontractor. That is, he states he will hold his bid open for some specified period or until after the general contract is awarded. Since he is reputable and his is the lowest

⁶⁴ Sharp, *Pacta Sunt Servanda*, 41 Col. L. Rev. 783, 796 (1941). A student's interviews dealing with a somewhat different but related subject are reported in 9 Univ. Chi. L. Rev. 153, 155 (1941).

⁶⁵ Space and time place some obvious limitations on this "systematic inquiry." The largest city surveyed, as stated, was Indianapolis. Cities several times as large such as Chicago and New York might have given somewhat different results. Likewise, a survey of another region, or a more predominantly agricultural or industrial region, might have revealed a different pattern. But insofar as Indiana lies somewhere between the extremes, geographically as well as economically, it is probably as representative a testing ground as there is available. Parenthetically, as a caveat to other fact searchers, it is suggested that similar surveys be conducted during Winter rather than Spring when the "hot stove" leagues are more likely to be in session, and the "surveyed" have more leisure time to respond.

bid, you use it in preference to others in making up your general bid; but you do not inform him that you have done so. You are awarded the contract. A few days later this electrical subcontractor notifies you that he must withdraw his bid because of a sudden rise in the cost of some item.

What do you do? Do you attempt to hold him to his proposal? If he refuses to do the work, do you insist he pay you for any loss you suffer if you have to pay some other subcontractor more to do the same work?⁶⁶

In the enclosed questionnaire the problem was broken down into a number of multiple choice questions. The general contractor was asked to check that response which came closest to his own experience, and if he found it impossible to select a particular response, to leave the question blank. He was also urged to comment on any of the questions or answers. Listed below are the tabulated responses on each question from the eighty generals with a summary of the comment directed toward each question.⁶⁷

1. *In a typical big, commercial job, do you generally receive*

- [34] (1) "firm" proposals (which state they will be held open until after the award or for any specified period, as in my example)
- [14] (2) proposals which say nothing about being held open
- [28] (3) about an equal number of each kind of proposal
- [4] No response

It appears that more than half the responding contractors receive firm proposals.⁶⁸ Several generals commented that during the present inflationary period many of the proposals carried price escalator clauses⁶⁹ or

⁶⁶ This statement of the problem was preceded by an introductory paragraph disclaiming any interest in the information being solicited other than for scholarly purposes, and followed by the paragraph below, designed to recognize the difficulties in generalization and to encourage free comment:

"The short questionnaire which I am enclosing is designed to enable you to answer these questions. I realize the difficulties involved in asking you to generalize about your experience in such a situation: your practice may vary with the type of project (depending on whether it is private or governmental), or the size of this general contract; or it may vary with the type of subcontract (depending, for example, on whether it is electrical or painting), or the size of this particular subcontractor, or whether he is local or out-of-town, or the amount of work and money involved in his particular bid, or your previous dealings with him, or his reputation in the community. Nevertheless, such information as you could give me would be of great value. If it is of any help to you in replying, I have narrowed my question to the *typical, large, private, commercial job*. If you vary your practice in the case of smaller projects, residential construction, governmental projects, etc., I should appreciate your comments on the questionnaire. In fact, I am particularly interested in any comments you would care to make about this problem."

⁶⁷ The responses were tabulated and analyzed on an IBM machine. The questionnaire responses, accompanying letters, contract forms and other data collected are deposited in the Indiana University Law School Library.

⁶⁸ Adding to the total of responses to part (1) one-half the total of responses to part (3).

⁶⁹ An escalator clause means that the fixed price will be raised or lowered, depending on the prevailing market price at the time the work is to be done or at some other specified time. The clause may be general or apply either to the material or the labor item. One general commented that about half of the bids received today have escalator clauses. Insofar as a proposal is tied only to market price, it is in that sense "firm."

very short specified time limits. One contractor noted that some of the better subcontractors today give the general a choice between two proposals on the same job, one, a bid with an escalator clause and the other, a firm bid which includes an extra amount representing the subcontractor's estimate of the probable price increase in effect at the time the work is to be done.

2. *Do you generally*

- [51] (1) require that subcontractors submit "firm" proposals
- [7] (2) require that subcontractors use your own proposal form (if you have one)
- [22] (3) make no attempt to control the kind of proposal submitted
- [0] No response

Of the fifty-one generals (better than half) who stated that they required subs to submit firm proposals,⁷⁰ seven qualified their responses in regard to what was meant by a firm proposal. One general commented that firm bids were only required from unknown subcontractors or material suppliers.⁷¹ Two commented that during normal times they tried to obtain firm proposals from all subs but that in today's short market it was sometimes necessary to take bids with escalator clauses. Two insisted upon a maximum "escalation" with the basis explained. One stated categorically that he would not accept a bid with such a clause if he had received a firm bid on the same item, even if the firm bid were ten to fifteen per cent higher.

3. *If you decide to include a particular bid in your estimate, do you generally*

- [27] (1) notify the subcontractor immediately you "used" his bid
- [52] (2) make no effort to inform him at that time
- [1] No response

A surprisingly large number of the generals stated that they notified the sub immediately when they used his bid. One went so far as to state that he notified all bidders as to disposition of their bids whether accepted or rejected. Another noted that his answer depended entirely on the responsibility and reputation of the subcontractor. One general's comment was that he never did so unless a sub inquired what his status was.

4. *If you fail to notify the sub at that time, is it because you think*

- [26] (1) it's not necessary because you expect to be able to hold him
- [3] (2) you can't hold him anyway because you don't yet have the contract for the job
- [34] (3) you don't want to be bound until you get the general contract
- [2] (4) some other reason (please comment on the other side)
- [15] No response

⁷⁰ Follow-up letters were written to the seven generals who stated that they required the subs to use their own proposal form, but no sample forms were received.

⁷¹ "In other words, if you deal only with known established subcontractors there is no need to insist on a firm bid, no matter what the size of the project."

Thirty-four, the largest number of responses, gave as their reason for failure to notify the sub a desire not to be bound until they obtained the general contract. The only comment on this answer was one ambiguous answer: "I will take a chance on my own." The next largest number were those who thought it not necessary to notify because they expected to be able to hold the sub. Several who checked this response stated that they dealt only with well known firms and, hence, considered it no real problem. The most illuminating commentary on failure to notify at the time of use came from a general who stated:

The policy of notifying subcontractors of your acceptance of their proposal before submitting your own bid would necessitate setting a deadline for receiving bids on subcontracts. It is the practice of subcontractors to submit their proposals at the last moment, and a deadline could disqualify many "low bids" and affect the chances of receiving the award. It is also the practice of some subcontractors to lump several items in one amount to make price comparisons difficult, thereby forcing you to contact them before awarding the subcontracts. Many proposals will overlap. Some including certain items that are excluded in others. Alternates proposing substitutions of materials requiring the approval of the architect may make it necessary to secure the contract before making any award to the subcontractor. These and many other aspects make it highly impractical to award or notify subs of acceptance before being awarded the contract.

5. *If you are awarded the contract, do you*

[65] (1) feel bound to give this subcontractor the job

[13] (2) feel free to pick any other subcontractor

[2] No response

This was the key question. Sixty-five of the eighty contractors felt bound to give the subcontractor whose bid they had used the job. In other words, they represented that they did not "negotiate" after the general contract was awarded. One put it in terms of "bad ethics not to award the subcontract to the one which you used to obtain a general contract; however, it is done frequently, I'm sorry to say, but usually done only when the general finds he has made a mistake in the preparation of his bid and naturally wishes to avoid a loss on the job." Another put it this way: "Yes, he is part of your organization."⁷² Several qualified their attitude of "feeling bound" only on the double assumption of the sub's past experience being "clean" and his proposal clear and complete and strictly in accordance with the specifications.

Of the thirteen who felt free to pick any other subcontractor one put it in terms of necessity to investigate the sub's responsibility before making an award. Another hedged by saying "that the nature of the subcon-

⁷² This contractor was one of those who stated that he notified the sub immediately when he used his bid.

tractor, that is his reputation and financial condition, determined the methods used by this office. We also take into consideration many other factors; therefore, we have no hard and fast rule for subcontract award which can be answered completely." One general stated that he only felt bound to give a sub the job if he were the only one bidding; otherwise he felt free to make a selection after the general award. Oddly enough, none of the thirteen generals undertook to defend their "feeling free to pick another" attitude in terms of freedom to contract, free competition or any other of our accepted abstract economic norms.

6. *If, not having notified the subcontractor that you "used" his bid, you are awarded the contract, do you*

[55] (1) notify him at once that he has the job

[22] (2) notify him within a reasonable time so that he may prepare to come on the job

[0] (3) notify him when it's time for him to come on the job

[3] No response

Responses here indicate early notification to the sub. As one general explained it: "We enter into our subcontracts immediately after getting the job so they have time to prepare drawings and obtain materials." One general noted that at this point he notifies and gets a signed contract. Subsequent correspondence indicated that many of the general contractors use a special subcontract form or purchase order form to sign up the subcontractor after the general contract has been awarded.⁷³

7. *If, as in my example, the subcontractor withdraws after you have been awarded the contract, do you*

[48] (1) forget it

[13] (2) threaten him with everything short of a law suit

[2] (3) threaten him with suit

[0] (4) sue him, if there's enough money in it over and above attorneys' fees

[17] No response

This question elicited most of the free comment. Seven generals stated categorically that this had never happened to them. Several stated that it could not happen because they invited bids only from reputable subcontractors. Several contractors put it in terms of "seldom happening." One stated that in the past twenty-five years it had been his experience to have had this problem confront him only once: "In the one case we advised the subcontractor that his refusal to do the job would make it necessary that he would never again be asked to bid on our work. He did the job at the quoted price."

By far the largest number, forty-eight, stated that, if it did happen,

⁷³ An examination of these special subcontract and purchase order forms revealed nothing extraordinary.

they would "forget it." A number meant by this that they would forget it completely: one because in his opinion he had no legal redress, another because he did not like lawsuits, another because usually bids are very close and that he would, therefore, award it to the next lowest bidder, another because it would be useless to attempt to force a performance on a sub who was irresponsible, or putting it another way, a sub who is losing money will seldom do a good job. A few general contractors stated a willingness to work out an equitable settlement with the withdrawing subcontractor.⁷⁴

In contrast to the forty-eight generals' willing to forget "completely," fifteen would threaten suit or everything short thereof, by which they meant "blacklisting" or putting this particular sub on their "unreliable sub list." One noted that this information would be broadcast and become general knowledge among the trade. Actually, only two of the fifteen generals suggested that they would go so far as to threaten the sub with suit. One qualified this by stating, "only if I have signed his proposal"; the other by stating, "only if this is a large contract." As one general summed it up cryptically; "The attorney is the only one who gains by this move."⁷⁵ It is quite significant that not a single one of the eighty generals was willing to commit himself to what was by definition a profitable lawsuit, and only two had gone so far in their thinking as to contemplate threatening suit. Hence the sensitivity mark to legal wrong seems relatively low.

8. *Have you ever considered binding the subcontractor before the award by*

- [6] (1) a contract
- [2] (2) an option
- [12] (3) a bid bond
- [2] (4) some other device (please comment below)
- [46] (5) never considered it
- [12] No response

Only twenty of the eighty generals had ever considered using one of the three binding devices.⁷⁶ One general wrote that he was accustomed to con-

⁷⁴ One general suggested that the only remedy was prophylactic: a diagnosis of all subbids in advance, and if a subbid appeared too low or out of line, he would advise the sub before using the bid or else discard it and use one which was in line. Thus, he could avoid subbids being withdrawn. But cf. *Albert v. R. P. Farnsworth & Co.*, 176 F. 2d 198 (C.A. 5th, 1949), note 28 supra.

⁷⁵ Or as another general put it: "It has been our experience in the past to try to avoid all courts and legal methods in dealing with subcontractors and suppliers, and, therefore, we have probably been far too lenient."

⁷⁶ Follow-up letters were sent to all general contractors who indicated one of the three suggested methods of binding the subcontractor before the award of the general contract, requesting specific information as to the particular device used.

tracting with his subs in advance by using this formula: "this contract shall become fully valid when and if the 'owners' enter into agreement with the general contractor." This appears to be the type of conditional contract which Judge Hand suggested in the *Gimbel Bros.* case. Another general said he made use of the contract device only "if the size of the job warrants it." Neither of the two respondents, who checked "an option," explained the type of option in mind. Of the twelve who suggested the use of a bid bond, only one responded to further inquiry with a sample bid bond, and commented: "Why shouldn't a general have some protection from the sub if there's a chance of the sub changing his price after the contract is let."

As to other possible devices to bind the sub, the ideas were sparse. One general suggested what amounts to an informal mutual understanding: "by studying the job carefully with a responsible subcontractor who then knows that if we are successful he automatically gets the job, we are able to bind him." Of those who had never considered using a binding device, one general suggested that a major objection is that there is seldom time to enter into any formal contracts with subs because the subbids generally come in at the last minute. Several of the generals took the legally mistaken position that the written proposal or signed bid was the equivalent of a contract.⁷⁷

Questionnaire Survey of Subcontractors

In the letter to the 275 subcontractors the following problem was put:

Suppose you submit a "firm" proposal to a general contractor to supply the materials and do the work on a typical, large (\$250,000 or thereabouts), private, commercial job. By a "firm" proposal I mean that you say you will hold your proposal open for 30 days or until such time as the contract is awarded. Suppose, further, since your bid is lowest, the general contractor uses your bid as a basis for his estimate in preference to others he received, but he does not inform you he has done so. He is awarded the contract. Before he takes any steps to notify you that you have the job, you are faced with a sudden rise in the price of materials (or some other unforeseen change in circumstances) and you know you will lose money on the job if you do it.

⁷⁷ There was also some comment not directed to any particular question: One general stated, as a rule of thumb to determine the reliability of the sub, that if a low bidder is not known to be reputable or is one with whom he had had little experience and his bid is more than fifteen per cent below the next bidder, he will not use his bid. Another contractor explained withdrawals by subs thus: "Many of the subs who back out of a bid after submitting it are small outfits who are talked into cutting their bids too low or misled by chiseling general contractors who are trying to get themselves a nice general contract and have no interest in the subcontractor's profit." A number of the general contractors indicated that they did not consider themselves bargaining at arm's length with their subcontractors but considered the subs with whom they dealt as part of the organization, "a very loyal and handpicked bunch of firms." Hence, the awarding of a subcontract resembles the issuance of an order from the front office of a factory to a department to manufacture a component of the product.

What do you do? Do you feel free to withdraw your proposal or change your proposal, or do you feel bound to the general contractor?⁷⁸

Again, in an enclosed questionnaire, the problem was broken down into a number of multiple choice questions. The subcontractor was asked to check that response which came closest to his own experience and, if he found it impossible to select a particular response, to leave the question blank. He was also urged to comment on any of the questions or answers. Listed below are the tabulated responses from the ninety-three subcontractors on each question with a summary of the comment directed toward each question and also any differentiation as among the four trades questioned, i.e., (1) electrical (2) plumbing and heating (3) sheet metal and roofing and (4) painting and decorating.

1. *In a typical, big, commercial job, do you generally make*

[60] (1) "firm" proposals (which will be held open until after the award, as in my example)

[25] (2) proposals which say nothing about being held open

[8] No response

About two-thirds of the subcontractors indicated that they generally made firm proposals. About ten commented that they put some time limit on their proposals: five, ten, fifteen, thirty or sixty days, as the case might be, or some named date within ten days after the date for letting.⁷⁹ Several qualified their firm proposal response with "if the plans and specifications are certified and complete" or "if the material supplier will grant us a firm proposal."

Half a dozen subs noted the use of escalator clauses. One plumber noted that in a job of even \$5,000 it is usual to have a "labor clause." Another plumber noted that during a time of changing prices "we put in an escalator clause on material and labor." One roofing subcontractor

⁷⁸ This statement of the problem was preceded by an introductory paragraph which again disclaimed any interest in this information other than for scholarly purposes, and was followed by a paragraph (similar to the paragraph quoted, note 66 *supra*) which recognized the difficulties in generalization and encouraged free comment.

⁷⁹ The sub with the fifteen day limitation admitted that when the general requested more time it was usually granted, though sometimes this necessitated a price increase. One painting subcontractor commented that subcontract escalator clauses had been declared illegal and that, therefore, it had been the practice of his association, the Painters and Decorators Contractors' Association, to eliminate such clauses. "Some subs," he reported, "do insert a 'thirty day time limit,' a practice which we discontinued years ago." "Most of these subs," he noted, "are independent and do not belong to our association. If we expect more than a 10% increase in wages [the most important item in a painting subcontract], we arrange our cost accordingly." In a letter, dated Oct. 17, 1951, the executive director of the above association denied knowledge of any illegality being attached to escalator clauses and, in fact, stated that the association advocated that their members protect themselves against a rising market by including such a clause, especially in case of a large job that must be performed over a long period of time.

noted that he did not use the escalator clause even in abnormal times when reasonably sure he would get the business and that the job would be completed within a reasonable time at the cost that he figured. A plumbing subcontractor stated: "As a matter of policy we seldom take advantage of the 'escalator clause' which is a part of our standard contract form for private work. We think we have been more than repaid by the good will created . . . and our growing reputation for fair dealing. The legal aspects have no bearing on our policy."

Two subcontractors noted that all their quotations included a clause making price subject to change without notice, the completely non-firm offer.⁸⁰

2. *If you are invited to bid, are you generally*

[49] (1) required to submit "firm" proposals

[3] (2) required to use the general's proposal form

[27] (3) given complete freedom as to the form of proposal you make

[14] No response

Slightly more than half of the subcontractors were generally required to submit firm proposals. Only three were required to use the general's proposal form.⁸¹ A roofer noted that "in most instances we are required to submit a firm proposal for a specific lump sum. In some cases we are asked to bid firm on a fixed-fee-plus-percentage basis, an hourly-labor-rate basis or a unit-price basis." Another roofer noted: "General contractors as a rule desire firm proposals on all work whether large or small. This is especially true of large commercial jobs. . . . It is very hazardous to submit firm proposals today unless price protection can be obtained from the manufacturer."⁸²

3. *If the general contractor decides to include your bid in his estimate, does he generally*

[17] (1) notify you immediately that he "used" your bid

[65] (2) make no effort to inform you at that time

[11] No response

Whereas about a third of the general contractors stated that they notified the sub immediately upon use of his bid, only about a fifth of the subcontractors acknowledged this practice.⁸³ Of the seventeen who stated

⁸⁰ There were no significant variations in the responses from the four trades, with perhaps the exception of the painters where a relatively smaller number generally made firm offers: seven painters generally made firm proposals and five did not.

⁸¹ One electrician noted that architects often required use of an architect's proposal blank.

⁸² There were no significant variations among the four trades.

⁸³ See "general" question no. 3, p. 259 *supra*. Of course, this discrepancy may be explained by the fact that most subs may have experienced both kinds of generals and may generalize their opinions in the direction of the general's practice more disadvantageous to them.

that they were notified, several suggested the information was not entirely voluntary on the part of the general. A roofing sub commented: "We usually learn from unsuccessful bidders whether our bid was the lowest. In such event it is a logical assumption that the successful general used our bid." An electrical sub stated: "The type of contractors we are bidding with have always told us at bidding time if the job is ours or not. They will also tell us when they use our proposal." One plumber noted that they were never notified except by those generals with whom they worked very closely.⁸⁴

4. *If, not having notified you that he "used" your bid, he is awarded the contract, does he*
[17] (1) notify you at once that you have the job
[47] (2) notify you within a reasonable time so that you may prepare to come on the job
[10] (3) notify you when it's time for you to come on the job
[19] No response

Here there was an even wider discrepancy between the responses from the generals and the subs. Whereas fifty-five of the eighty generals stated that they notified the sub at once that he had the job, only seventeen of the ninety-three subs stated that they were notified at once.⁸⁵ The majority said they were notified within a reasonable time, however.

Several subs commented on the reasonableness of the general not notifying immediately. One roofer stated that the information whether he was low bidder was generally freely given if he sought it; otherwise, he was usually notified when he was needed or shortly before it was time to start his part of the project. An electrical sub commented: "It usually takes about thirty days to complete contract terms on public work, and a subcontractor usually has to wait until the general is all set before he receives a subcontract. During this waiting period the unethical generals shop around for lower bids, including your own. We refuse to 'enter prices after letting' unless changes in the job are made which require a price revision."⁸⁶ One plumbing subcontractor thought this matter important enough to declare that it was his policy to accept commercial contracts only with the understanding that "I be notified immediately that my bid has been accepted so that I may immediately purchase the materials required. In these times I feel that is the only way I can guarantee prices

⁸⁴ There were no significant variations among the four trades.

⁸⁵ See "general" question no. 6, p. 261 *supra*, and the qualification made *supra*, note 83.

⁸⁶ Several subs commented that the reason why more generals do not notify immediately is because they desire to bargain for lower prices after using a bid. As one sub put it: "This depends on the contractor; quite often they 'peddle' our price."

and delivery." A roofer noted that "now that materials are critical the general usually notifies all successful bidders as soon as possible in order that they may make necessary arrangements for labor and materials."⁸⁷

5. *If, as in my example, there is an unexpected rise in the price of materials, do you*
[75] (1) feel bound to do the job
[13] (2) feel free to withdraw
[5] No response

In this parallel key question, a slightly larger proportion of subcontractors felt bound to do the job than the group of generals who felt bound to the sub, having used the sub's figures.⁸⁸ There was some slight qualification of this attitude. One electrical sub stated: "Only if the proposal is signed within fifteen days; otherwise feel free to change or withdraw our bid as we see fit." A plumbing sub noted: "If a firm proposal is asked for." A roofer noted: "We feel bound regardless of price increases if such increases are not due to changes in design or negligence on the part of another contractor on the project." Several subs based their affirmative response on the reputation of the particular generals with whom they were dealing. One roofer stated: "Providing that our experience with the successful contractor is such that he awards the business to such sub whose bid he has used to get his award of the general contract." Or as another put it: "If the contractor has acted in good faith, we will do the job."

Of the thirteen subs who felt free to withdraw in the event of an unexpected rise in the price of materials, several suggested attempts at negotiation. One electrical sub stated: "We feel that we are at liberty to negotiate before signing a contract. We have found the spirit of cooperation in this instance is very satisfactory." A plumbing subcontractor stated he would withdraw if possible, adding "if there are increases that hurt or if an error has been made, we have made a practice of putting our cards on the table and attempting an adjustment with the general contractor or the owner. We have found in most cases, particularly in private work, that a satisfactory arrangement can be worked out." Two subcontractors flatly stated that they did not take any job that did not look attractive at the time it was let, regardless of prior negotiation.

It is not surprising to learn, upon analysis, that of the thirteen subs who felt free to withdraw, only one was usually notified by the general that his

⁸⁷ There were no significant variations among the responses from the four trades, except that none of the thirteen painters questioned indicated having been notified at once he had the job.

⁸⁸ See "general" question number 5, p. 260, *supra*.

bid had been used.⁸⁹ Of the same thirteen, only one was notified at once that he had the job.⁹⁰

6. *If you feel bound to do the job, is it*

[70] (1) because you know the general relied on your bid and you feel morally or ethically bound to him

[4] (2) because you think you're legally bound

[2] (3) because of some other reason (please comment on the other side)

[17] No response

Of the seventy-six subs who answered this question seventy stated they felt bound to do the job because they knew the general relied on their bid and they felt morally or ethically bound to him. This was the closest to unanimity of the responses tabulated on any single question. This attitude was variously stated. One electrical sub stated: "We older contractors usually think along the lines of moral and ethical operations; providing we feel we are dealing with this same kind of general contractor. Many of the younger men in the field apparently think in terms of 'legal rights only.'" Another experienced sub, also electrical, stated: "This company during its fifty years of existence has established a policy to make good on any proposals that it offers regardless of the outcome. Due to recent material and labor increases we are suffering losses on several jobs because of this policy. In defense of this we find that because of our policy we obtain work when we are not the low bidder and receive other favoritism because of the reliability of our quotations." Another subcontractor stated: "A large portion of our work is contracted by word of mouth with no witnesses, and a man's word would have to be his bond."⁹¹

Several subs noted how they protected themselves other than by putting on a time limit or using an escalator clause so as to be able to maintain this policy of following through on a bid. It was pointed out that if the contract was quite large, they contacted their suppliers and were always protected on outstanding commitments. One sub noted that he gave firm prices at a price high enough that he could do the job at a profit. He added, "I don't get all the jobs, but I don't have any arguments." There was, however, some qualification of this general attitude to keep the bid open at all cost. One sub noted that he did so unless he knew that the general was shopping for a lower price. Another sub put it conversely: "We do not bid with contractors unless we feel certain they will use our bid in the

⁸⁹ See "subcontractor" question number 3, p. 265 *supra*.

⁹⁰ See "subcontractor" question number 4, p. 266 *supra*. There were no significant variations among the four trades.

⁹¹ One sub admitted that he had no protection from a general who peddled his bid; however, he added, it was not the usual practice.

event that it is low."⁹² One contractor suggested that he could maintain this position because he dealt with a set number of contractors who were his "friends"; and should unforeseen circumstances arise, he had confidence that they would protect him to the best of their ability.⁹³

7. *If you do feel free to withdraw, is it*

- [4] (1) because you don't think you're legally bound
- [17] (2) because you don't think it is fair that you should be bound while the general remains free to choose a rival subcontractor to do the work
- [5] (3) because of some other reason (please comment on the other side)
- [65] No response

Curiously enough, twice as many subs answered this question as had answered, to the key question, that they felt "free to withdraw."⁹⁴ Perhaps the logical inference is that while only thirteen subs felt free to withdraw bids, another thirteen were willing to consider the possibility under proper circumstances. By far the great majority of the twenty-six, that is, seventeen, were impressed with the unfairness implicit in the sub being bound while the general remains free to choose a rival subcontractor to do the work. As one roofing subcontractor put it: "To prepare a bid requires considerable time and effort on our part, and that is why we feel it is unethical for the general contractor to buy from our competition when he used our bid to make up the general bid upon which the contract was awarded to him. It is easy for our competition to find out what our bid was after the job is awarded, and easy for him to reduce his price so as to be below us; whereas we in fairness to other bidders who used our figures are bound to stand by the original figure."⁹⁵

There was no comment by any of the four subs who thought they had a legal basis for revocation. Among "other reasons" given for feeling free to withdraw, one sub said that "unless the bid requires a performance bond we do not feel obligated or bound in any way for a bid when conditions change between figuring and letting of the job. Nor do we feel obligated for conditions beyond our control such as excessive material increases or adverse labor conditions." One contractor limited the range of his freedom

⁹² Or as another put it: "This depends on our relationship with the contractor and our knowledge of his ethics."

⁹³ There were no significant variations among the four trades.

⁹⁴ Twenty-six as compared with thirteen in "subcontractor" question no. 5, part 2, p. 267, *supra*.

⁹⁵ A painting subcontractor put it this way: "Some contractors try to chisel you down after the contract has been awarded by telling you they would like to see you do the work, but someone else is 5% lower. When we bid we have one price only. Some contractors will ask for a bid and tell you you will get the job if you are low. They get the job and use your estimates and hire painters by the day."

by stating that when he used an escalator clause he did not pull out of his bid unless the increase in cost of labor and material rose more than five per cent above the cost figures. One contractor took the pessimistic position that his "experience had shown that perhaps 75 per cent of the time the subcontract is not awarded to the company which had the original low figure. There is much shopping for lower prices and chiseling done by general contractors after they are awarded their contract." This contractor drew a distinction between generals friendly to his company to whom they felt morally bound in case of an error in his figures and contractors who he knew from past experience were "chiselers" and "shoppers" to whom he did not feel morally or legally bound. Another subcontractor felt "free to withdraw if the contractor was not a regular customer or had attempted unsuccessfully to place this business elsewhere at the original price."⁹⁶

8. *Have you ever considered trying to bind the general before the award by*

- [4] (1) getting him to sign a contract conditional on his getting the job
- [5] (2) putting up a bid bond
- [6] (3) some other device (please comment below)
- [62] (4) never considered it
- [17] No response

Only fifteen of the ninety-three subs had ever considered trying to bind the general before the award. Several subs stated categorically they were sure that the generals would not permit such a practice, the assumption being that even in today's tight market the general is in the driver's seat. One sub said: "It is impractical." Another said he was certain the general would not stand for it. Another sub put it more concretely: "We are not doing this because our competition is not doing this, and so we let the generals [the unethical ones] shop for lower bids even though he used our bid to get the job."

Only four subs had ever considered getting the general to sign a contract conditional on his getting the job. One electrical subcontractor gets the general contractor to agree in writing that if he is awarded the contract, he will in turn award the sub the subcontract on the basis of his bid. Four subs suggested some kind of verbal understanding tantamount to a conditional contract. One put it in terms of "a mutual understanding," another "a verbal commitment," another "a gentlemen's agreement." As one sub put it: "This is an unusual situation, but where you have good faith on both sides plus a good reputation, it is done. Also, a

⁹⁶ There were no significant variations among the four trades.

general contractor quite often likes to have one contractor that he can depend upon to give him service at a fair price."

Although five subs indicated that they had thought about putting up a bid bond, there was no spelling out of this idea. No subcontractor recognized that legally this would simply bind the sub without putting any obligation upon the general. One subcontractor suggested something similar to a bid bond. He stated that in the last six months he had written into his proposal this statement: "This proposal is firm and binding providing we receive postmarked your letter of intent that you are using our bid prior to the letting date,, 1951." This is the device which the plaintiff subcontractor employed in *Williams v. Favret*,⁹⁷ with the result that it was held to make the sub's offer irrevocable without imposing any obligation on the general to accept.

A number of "other devices" were suggested for protecting the sub. The most common suggestion was direct bidding and contracting with the owner. This suggestion came solely from the two mechanical trades, the plumbers and the electricians, the larger number from the latter. One electrical sub stated that "in a \$250,000 job lately our experience is to become a prime contractor and to use the general only for coordination." A plumbing subcontractor put it thus: "As a general rule we do not like to be a subcontractor on plumbing, heating and air conditioning to a general contractor because 1) they are not as a rule honest, 2) it costs the owner 10, 15 to 20% more for his job, and 3) the owner gets a better job by direct contracting as changes can be made and if they are not too drastic, no charges or extras are charged to the owner." Another plumbing subcontractor noted: "Most large manufacturers are awarding direct contracts with the mechanical trades to save handling charges by the general."⁹⁸

Another protective device suggested by some of the subcontractors is to require the general to list the subs whose bids he has used in preparing his own bid to the owner. As one roofing contractor put it: "There never was a specification written especially where they feel they must use the term 'or equal' that could not be interpreted by someone to do a poor job at a lower figure." Another obvious device suggested by several

⁹⁷ 161 F. 2d 822 (C.A. 5th, 1947); see note 46 supra.

⁹⁸ An electrical subcontractor summarized the direct bidding argument when he stated: "I should like to point out the fact that in the present-day modern building the total subcontract cost is approximately 40-to-50% of the total building cost; and for this reason I am opposed to the present practice of subcontractors bidding to a general. I believe that the mechanical contractors, in view of their combined contribution toward the erection of any particular building, should be considered as prime contractors."

subs was to refuse to quote those generals who were notorious for peddling subcontractors' prices.

In summary, it seems that the subcontractors are very pessimistic about compelling the general to play the game according to the prescribed competitive rules unless they can persuade the awarding authority to require the general to list his subs or to accept direct bidding (thus by-passing the general). The only other alternative is to get into a strong enough bargaining position to be able to refuse to quote "notorious" generals.⁹⁹

Personal Interview Survey of Generals and Subs in Indianapolis

Thirty generals and fifteen subcontractors in the Indianapolis area responded to the two questionnaires. Their tabulated responses were not significantly different from the responses received from the rest of the state; hence no comment will be made upon them. However, as a partial check it is worth comparing the responses of the five generals and six subs interviewed in the Indianapolis area against the tabulated questionnaire responses discussed above.

The pattern of responses from the five generals interviewed (all were large, commercial contractors) was not substantially different from the questionnaire responses. There was considerable variation in the receipt and requirement of firm proposals. Most of the generals stated they received both firm and non-firm proposals and noted that they made no attempt to control the kind of proposals submitted. Nevertheless, several made the point that, though they do not require firm proposals, they understood them to be firm. One general said that in the case of an excavation bid he did prepare the invitation and proposal because it was so complicated. One very large, interstate general contractor underlined the informality of construction industry bidding by referring to a recent \$300,000 heating bid which he received over the telephone and which was not confirmed in writing.

⁹⁹ One subcontractor painted a fairly dismal picture: "Here in _____ we will only give bids as a sub to two general contractors out of a total of fifteen generals that do all kinds of contracting work, because these two will, if they use our bid and they are successful, give you a list of your competitor bids showing these in black and white that you were the low bidder originally and entitled to get the job. The other contractors would like to have your bid; and if you are low, they would use it; and if one of these generals should be low with your figure, they would peddle it to one of their plumbing and heating friends, and give them the job; and you that had the low bid would be double crossed. It's a known fact among generals that the more bids they get from subs the better chance they have in chiseling the subs and causing the subs to compete against each other while the general sits in the driver's seat pitting one sub against the other; and the more the generals can chisel the more money he makes on his contract." The final fillip was given by a sub who stated: "We do not consider ourselves subcontractors, and I can see no good reason why we should be classed as such."

None of the generals made any attempt to notify subs whose bids they had used before the general award. Their reasons were interesting and contradictory. One general did not think it was necessary because he expected to be able to hold the sub; while the other thought it was not necessary because he did not expect to be able to hold the sub. Several practical reasons were given for not notifying the sub. One general pointed out that an architect often changes specifications after the general award and that if he has notified the sub, he must accept the sub's figures on these additions with no chance to bargain. Two generals pointed out that frequently unsolicited low bids came in an hour or so before the deadline for filing and that they often felt obligated to use them lest another contractor do so and win the general award. Moreover, because of the frequency with which late unsolicited low bids are received, it is well-nigh impossible to notify the sub and equally difficult to bind the sub by any contract or bond device. One general gave as the reason for the eleventh hour low bids the practice of certain subs to find out from friendly generals what the other bids have been so that they can underbid. One general pointed out that he did not notify the sub in advance because he did not want the sub "to cry baby to him for more money which he is likely to do if he knows he has been picked for the job."

On their basic attitude toward the sub the generals split two to three; two feeling bound to give the sub the job and three feeling free to pick any other subcontractor.¹⁰⁰ One of the two generals who felt bound to give the sub the contract pointed out that he considered that the sub whose bid he had used had helped him get the contract and was "part of his organization," and he expected to hold him. The other put it on ethical grounds, but added he never expected to be able to hold the sub regardless of the wording of his offer for the reason that the prevailing bid shopping practices in the Indianapolis area would cause the sub to consider himself not bound. One of the three who felt free to pick another sub pointed out that it was partly because on late-installed items, such as venetian blinds, he might wait as long as a year and "play the market" before ordering. Interestingly enough, all three who felt free to pick another subcontractor believed that they should be able to hold the sub. They all claimed that they notified the selected sub immediately after the general award. One of these even said he would sue if the item were

¹⁰⁰ Were this a large sample, it would have more significance. Nonetheless, there is some significance in three large commercial generals taking the "feel free to pick another" position. Any one of the three would make a first-class expert witness for another Gimbel's.

large enough. None of them had considered using any legal device to bind the sub.¹⁰¹

The six subcontractors interviewed in Indianapolis represented all of the four trades surveyed by questionnaire. Again, the responses did not substantially depart from the questionnaire responses. Only one of the six subs stated that he made a firm proposal, and none of the six was required to make firm proposals, but this may have been because all six were large subcontractors. The one sub (a roofing sub) who did make a firm proposal limited it to five days and made it subject to approval on credit, but since he admitted that in practice he held the bid open as long as necessary, in effect it was not limited as to time. All six stated that they were not generally notified prior to the award by the general, though the painting sub did mention one big interstate firm which was in the practice of notifying if it were going to use his bid. All six expected to be bound to their bids regardless of contingencies. Four put it on moral and ethical grounds. One put it on legal grounds. One said he had forty years' reputation at stake.¹⁰² Although none of the six thought the present situation satisfactory, none had ever considered binding the general. One plumbing sub pointed out, for example, that a lot of money was spent on fruitless bidding: he had recently spent \$2000 estimating on a large Indianapolis apartment house, a subcontract for which he did not get. Another plumbing subcontractor illustrated the large amounts invested in estimating by pointing to the four estimators on his staff working full time, each at a salary of \$25,000 per year. He considered this cost part of his normal overhead. Both the electrical and plumbing subcontractors did considerable separate contracting and preferred it. Several of the subs stated they expected the generals to shop because "it was a practice ingrained in the trade." The plumbing sub said that he did not run into the bid shopping problem because he was selective in dealing with generals.¹⁰³

¹⁰¹ One of the generals pointed out that peddling is a two-way street. There are some subs who will come around after the award and say they have made a mistake in their own favor and make a "corrected" bid which is \$100 below the lowest bidder. This general said that he never played that game.

¹⁰² A painting subcontractor pointed out that the only risk he ran was an increase in wages, inasmuch as material was a relatively small item in the painting contract. If he anticipated a wage rise, he put in an escalator clause; since wages are set by a yearly contract, this is easily determinable.

¹⁰³ The only sub to suggest a sanction against shopping was the painting sub. He related an incident where a general who had no other painting bid had phoned him and urgently asked for a quotation. The painting sub gave the general the quotation, which the general used, but then awarded the contract to another painter. The sub didn't sue, but he related the incident publicly at the next contractors' association meeting. He states that ever since this general has had considerable trouble obtaining painting bids in the area.

III. PRIVATE ASSOCIATION AND GOVERNMENTAL CONCERN WITH THE FIRM OFFER PROBLEM

A "systematic inquiry" into the attitudes of general and subcontractors toward the firm offer problem would be incomplete without some study of the positions taken by the trade associations. Hence, 165 letters were addressed to nationally listed trade associations; responses were received from 60 associations, of which 20 contained relevant information. Information was also obtained from the Associated General Contractors, the largest association representing general contractors. Finally, because of the unique position of the architect both as adviser and agent for the owner and impartial arbiter between owner and general contractor,¹⁰⁴ information was obtained from the American Institute of Architects, the architects' professional association.

The official position of the Associated General Contractors on competitive lump-sum bidding is stated in *A Suggested Guide to Bidding Procedure*,¹⁰⁵ Section VI (c) of which states:

It is unethical, unjust and detrimental to the construction industry when a contractor, prior to the award of a general contract, discloses to architects, owners or others the amounts of sub-bids or quotations obtained in confidence for the purpose of preparing his bid.

Section VI (d) also disapproves of eleventh hour submission of subbids and states that the general bidder has no responsibility to accept any unsolicited subbid. As originally drafted in 1948, Section VI (b) read:

The general contractor should supply to each invited subcontractor a form of proposal for him to use in submitting his bid. When this is done, the subcontractor should submit his bid in exact accord therewith.

Though it might be assumed that one purpose for such a form of proposal was to make the subbid firm, the official explanation is that its sole purpose was to make sure that the subcontractor made his bid complete.¹⁰⁶ In the 1949 revision this sentence was deleted because the draftsmen thought it "preferable not to specify that each general contractor should have a standard form of proposal to be used by his subcontractors, but that the desired result could be accomplished by stating that the pro-

¹⁰⁴ See AIA, *Handbook of Architectural Practice* 20 (1951), discussing the architect's status.

¹⁰⁵ Published separately by the Associated General Contractors and the American Institute of Architects (AIA Document 333, revised ed., Fall, 1949). It was developed through the cooperation of the Committee on Contracts Documents of the AIA and a special committee of the AGC and has been approved by both organizations. It is designed for use in connection with building and related construction.

¹⁰⁶ Letter from the AGC, dated May 4, 1951.

posal of the subcontractors should be based on identical sections or headings in the specifications and related drawings."¹⁰⁷ There is no evidence that the draftsmen at any time had in mind requiring the subcontractors to submit a firm bid. Moreover, though the general is cautioned not to peddle the sub's bid before the award on the ground that it is a confidential matter, there is no deterrent in the *Guide* to the general's shopping the bid after the general contract is awarded.

The National Association of Home Builders has also refrained from preparing any subcontract proposal forms because, as they put it, "the advantages [do] not outweigh the disadvantages should our members utilize such forms without adequately checking them with local counsel. . . . As a national organization, we have refrained from concerning ourselves with our members' contractual matters due to the diversity of interpretation among the various jurisdictions."¹⁰⁸

In addition to jointly sponsoring the *Guide*, The American Institute of Architects in its official handbook,¹⁰⁹ which has gone far to standardize construction procedures, refers to the firm offer problem in several places. Article 36 of the General Conditions of the Contract¹¹⁰ states that the general contractor "shall, as soon as practicable after the execution of the contract, notify the Architect in writing of the names of subcontractors proposed for the principal parts of the work and for such others as the Architect may direct and shall not employ any that the Architect may within a reasonable time object to as incompetent or unfit."

This seems to make it impossible for the general to enter into a contract with the sub conditional on the award; it necessarily defers the general's final selection of a sub until the architect gives his approval after the execution of the contract. However, the second paragraph of Article 36 suggests as a way to obviate this difficulty that the general submit a list of subcontractors with his bid:¹¹¹

[this method] has much to commend it. Dickering of sub-bids after the contract is let is of advantage to no one but the Contractor and sometimes may prove a boomerang to him. It is to the advantage of the Owner that the sub-contracts be let to re-

¹⁰⁷ Ibid. See Section VI(a), A Suggested Guide to Bidding Procedure, op. cit. supra note 105.

¹⁰⁸ Letter from the National Association of Homebuilders, dated May 8, 1951.

¹⁰⁹ The Handbook of Architectural Practice (1951).

¹¹⁰ Ibid., at 126. This is one of the standard contract documents used in connection with the letting of contracts. The other forms in the group are the agreement, the drawings, and the specifications.

¹¹¹ "If . . . the change of any name on such list is required in writing by the owner after such execution, the contract price shall be increased or diminished by the difference in cost occasioned by such change." Ibid.

sponsible bidders at reasonable prices. If the names of the proposed principal Sub-Contractors are given in the proposal, and form part of the accepted bid, their status is determined and no second bidding for cut-rate prices is possible for those portions of the work. If any of these sub-bidders are incompetent or unfit, substitutions of satisfactory ones can be arranged before the contract is signed. Furthermore, the naming of sub-bidders permits a more intelligent analysis of the low bid and indicates the general class of work to be expected. Many Contractors, and particularly Sub-Contractors, favor this type of proposal, and the Article permits the Contractor to name his sub-bidders if he so desires, even if not required to do so.¹¹²

Another method of protecting the subcontractor is suggested by Article 35 of the General Conditions which reserves to the owner the right to let separate contracts in connection with the work.¹¹³ Unless the owner insists upon separate contracts (which, of course, short-cuts the problem entirely) or unless the architect insists that the general submit a list of the subcontractors with his proposal, it does not appear that the AIA requires any standard provision which obligates the general to award the subcontract to the sub whose bid he used in computing his estimate.

The AIA handbook contains two subcontract forms. One is "The Standard Form of Subcontract,"¹¹⁴ and the other is "The Standard Form of Acceptance of Subcontractor's Proposal,"¹¹⁵ but the "Institute has never felt it desirable or necessary or feasible to develop a standard form proposal either for general contractors or subcontractors."¹¹⁶ Their reason is that there are "so many variables inherent in such forms that they need to be developed for each job. Even then, except where a statute may require a precise form of sub-bid, an architect seldom prescribes such form unless he is using a special system of bidding in which uniform sub-bids are required."¹¹⁷ They also assume subbids "to be firm bids but, unless a bid bond is required, [they] are customarily subject to being withdrawn if mistakes are discovered prior to definite acceptance."¹¹⁸

In contrast to the "hands-off" policy of the associations of general con-

¹¹² Ibid., at 62.

¹¹³ The so-called "separate contract system" (which, historically, antedates the "single contract" system) "ensures a capable Contractor for each part of the work, whereas that of competition on the work as a whole tends . . . to beat down its quality by reason of each bidder being anxious to secure the lowest possible bids from Sub-Contractors, to that end often inviting incompetent mechanics to bid." Ibid., at 51.

¹¹⁴ Ibid., at 129.

¹¹⁵ Ibid., at 133.

¹¹⁶ Letter from the Chairman of the Committee on Contract Documents, AIA, dated June 18, 1951.

¹¹⁷ Ibid.

¹¹⁸ Ibid. "[B]id bonds are rarely used except on public work, and so far as I know, rarely used then." Ibid.

tractors and architects, the subcontractors and manufacturers through their various trade associations have taken a very definite stand on the firm offer problem. As a spokesman for the National Electrical Contractors' Association, one of the most active subcontractor trade associations, has put it:

A commitment made by a subcontractor to a prime contractor should be a binding one and should be scrupulously observed by both parties and it should be held in confidence until awards have been completed. Anything else is unethical, dishonest and extremely destructive both to the business and to public confidence and respect in the industry.¹¹⁹

The NECA has been active on several fronts to improve the position of the mechanical subcontractor. In their 1946 Statement of Policy, the NECA went on record as condemning the practice of any general contractor "who uses the lowest acceptable price from an electrical contractor in making up his bid on a general contract and then reopens the bidding for the same operation, commonly known as 'shopping.'"¹²⁰ The Statement continues, possibly as a *sequitur*: "The best interests of the public call for the continuing of [the] practice of separate letting of contracts for electrical work, and every effort should be made to extend this practice for both private and public work."¹²¹ The NECA spokesman explained:

[W]e are not concerned with putting the general contractor out of business. Many of our contractors believe that the general contractor provides an essential and desirable service of coordination or can and should provide such a service. We do not wish to impair it. What we are after is the unethical and dishonest practices of bid shopping and bid peddling inherent in the operation of an overall general contract. It should be clearly understood that there is no conflict between NECA and the AGC over bidding procedure. Both groups are trying to work out some practical and effective means of curbing an evil that is based on the propensity of men to chisel.¹²²

In October, 1950, after the outbreak of the Korean War, the NECA modified its position by stating that "specialty electrical contracts may be included under the general contract if desired."¹²³ The reason given by the NECA spokesman is that "in the defense period when there is much pressure for speed on construction projects, the federal contracting officers prefer to work through a general contractor on whose shoulders they shove

¹¹⁹ Letter from the NECA, dated April 13, 1951.

¹²⁰ NECA Policies, adopted by Board of Governors, October 14, 1946, reaffirmed November 14, 1948, p. 6. See note 34 *supra*.

¹²¹ *Ibid.* According to NECA, Report of the Legislative Committee 7 (Oct. 29, 1945), separate contracting "has been done in many cases in New England [on private work], and we believe with excellent results."

¹²² Letter from NECA, dated April 30, 1951. The NECA has gone so far as to publish an attractive pamphlet, *Electrical Contractors are Specialty Contractors* (undated).

¹²³ Resolution adopted by the NECA in annual convention at Los Angeles, October 18, 1950.

much of the work they should perform. Such a situation is more a reflection on the ability and efficiency of federal contracting officers than it is a compliment to the general contractor. But that is the way it is."¹²⁴

On another front the NECA has joined with two other mechanical trades, the plumbing and steamfitting contractors, to sponsor state legislation "to obtain a segregation of contracts on public works as a means of freeing these trades of the vicious practice under which public work is let through the general contractors."¹²⁵ New Jersey,¹²⁶ North Carolina,¹²⁷ Pennsylvania,¹²⁸ New York,¹²⁹ Ohio,¹³⁰ and Massachusetts¹³¹ have fallen into line. The first four states put a lower limit on the use of direct bidding and letting, ranging from one thousand dollars in New Jersey and Pennsylvania to ten thousand in North Carolina to twenty-five thousand in New York; they also limit it to specified mechanical trades such as plumbing, gas fitting, heating, ventilating and air conditioning, electrical installation, steam-power plants, structural steel and ornamental iron work. Ohio leaves the selection of the trades to the discretion of the awarding authority, as does Massachusetts which has adopted the NECA model law.¹³²

Several other subcontractors' trade associations have gone on record in favor of separate contracting. The National Automatic Sprinkler & Fire

¹²⁴ Letter from NECA, dated April 30, 1951.

¹²⁵ Report of the Legislative Committee, NECA, October 29, 1945, p. 6.

¹²⁶ N.J. Rev. Stat. tit. 52 § 32-2 (1937).

¹²⁷ N.C. Gen. Stat. Ann. § 143-128 (Cum. Supp., 1945).

¹²⁸ Pa. Stat. Ann. tit. 53 § 1501 (Purdon, 1931).

¹²⁹ N.Y. State Finance Law § 135.

¹³⁰ Ohio Gen. Code Ann. § 2362 (Page, 1937).

¹³¹ Mass. Ann. Laws c. 149 §§ 44 A, B, C, D (1950), noted in 62 Harv. L. Rev. 1346, at 1367 n. 114 (1949).

¹³² See Report of Legislative Committee, NECA, October 29, 1945. Under the 1939 Massachusetts statute the awarding authority would list on the general's proposal form the particular trades from which separate bids were required. The general would then invite subbids as usual, but would select that subbid which he intended to use and list it in his proposal form. As double protection to the state the subbidder, himself, would be required to file with the awarding authority the list of general contractors to whom he had submitted his subbid. This has the effect of a bid depository. Subbids must be delivered to the awarding authority and to the general contractor at least two days before the date for receipt of the general's proposal. The subbids may not be opened by the awarding authority until after the selection of the general contract. Since the names of all subbidders filing with the awarding authority are mailed to the general contractors bidding on the project, all general bidders are in the same position insofar as the availability of subs to do the work. After the award of the general contract, only the awarding authority may decide not to employ the particular subbidder listed by the general in his proposal. If it so decides, the contract price must be adjusted accordingly. The subcontractor selected must be notified within twenty-four hours after the general award. If the subcontractor selected refuses to sign a subcontract within ten days after notice, the awarding authority may select another subcontractor who must be the next lowest bidder.

Control Association gave as its reason that the work is so technical that the general contractor has little or nothing to do with it.¹³³ The Sheet Metal Contractors' National Association in a recently proposed code of trade practices, currently in operation in Chicago and many other areas, has taken the position that since the contractor installing ventilation and air conditioning equipment is directly responsible for proper installation and operation,

it would seem obvious that the best interests of all concerned, especially those of the owner, the designing engineer, or architect, and the contractor installing the work, are best served by treating the latter as a prime contractor dealing with and being directly responsible to the Engineer, Architect and Owner, rather than as a sub-contractor in which capacity dealings must be through a third party.¹³⁴

Several of the associations, while not going so far as to come out for separate contracting, have condemned what they consider to be "unethical practices" of the general.¹³⁵

Perhaps the most widely-used scheme promoted by trade associations to eliminate "bid-shopping" and "bid-peddling" within the framework of the competitive bidding system is the bid information or bid depository plan, which attempts to discourage such practices by exposing all the facts

¹³³ Letter from the National Automatic Sprinkler and Fire Control Association, dated April 18, 1951, which states in part: "The bidding for fire protection work, namely automatic sprinklers, is a field in itself as far as the regulations are concerned for the following reasons. First, the work must be installed in accordance with the rules and regulations set forth by the Underwriters and State Approval Agencies in order to secure the reduction in insurance rates ranging from 60% to 90%. The general contractor, in the vast majority of cases, is not familiar with this type of work, and if he attempts to let it by subcontract, very often there is a definite loss to the parties building and operating the property in their insurance savings that would otherwise result."

¹³⁴ Preface to Declaration of Principles and Proposed Code of Trade Practice, endorsed by the Sheet Metal Contractors' National Association (undated). A similar code covering so-called general sheet metal work is in the process of being written. Letter from the Sheet Metal Contractors' National Association, dated March 15, 1951. The Gymnasium Seating Council has taken a similar position. In a letter, dated March 29, 1951, its chairman stated: "In our industry we should much prefer to contract direct with the ultimate user of our product rather than have it included in general contracts. This is because our product is always contracted for, installed, and inspected on the site, and the title does not pass until the job is completed; and the contractor really does nothing except transmit the bid."

¹³⁵ For example, letter from the Tile Contractors' Association of America, dated March 15, 1951, stating: "There are some ethical general contractors who take bids and award the contract to the low bidder once the bids are open. This specie is in the minority. Most general contractors take the position that they are buyers and that the subcontractors are sellers; therefore, anything goes. They will play one subcontractor off against the other; they will make misstatements as to who the low bidder is and what his price is. They will do anything to get a low figure even after they have accepted original bids for the work."

"Of course, this type of thing fluctuates, depending upon the law of supply and demand. In other words, if there is plenty of business, the general contractor then is prone to take firms that do good work, are financially responsible, and have a minimum amount of trouble on their jobs."

concerning each bidding transaction. Though plans vary from association to association, a typical plan provides for local association members who bid a job to file a duplicate sealed bid with a depository (usually an escrowee such as a bank's trust department) at a stated hour in advance of the regular closing time for filing with the general contractor. Assuming all bidders comply, the bids are thus "frozen" until after the general contract is awarded and no sub is able to undercut a competitor whose bid has been disclosed to him during this period. Once the general contract is awarded, the sealed bids are opened and it can be determined whether the general has awarded the subcontract to the lowest acceptable subbidder. Some plans provide that penalties be assessed against members who fail to file as well as members who cut their bids after filing; most plans rely for enforcement on the social pressure resulting from a wide dissemination of bid information.¹³⁶

In marked contrast to the strong measures taken by some subcontractor associations against the general's "shopping" practices is the statement made by the Building Waterproofers' Association:

Usually general contractors do not regard the subcontractor's bids as being 'firm.' Wherever possible they will obtain as many competitive bids as they can and then call in the various bidding subcontractors and attempt to negotiate the best deal possible for themselves.

Even where the general contractor has a particularly favorable bid, it is my experience that he will get in touch with the subcontractor making such a bid and give him a chance to revoke it.

It is true that some subcontractors make their bid good for a definite period of time, anywhere from thirty to ninety days, but I think these cases are in the minority.

If under the law of contract, any bid must stand until revoked, then general contractors do not make a practice of enforcing such a doctrine of law.¹³⁷

Such a statement by a subcontractor association is actually closer to the stand of the manufacturers' trade associations on the status of their proposals. Several have urged their members to adopt uniform sales contracts which specify that the quotation for goods shall be in terms of an invitation to bid rather than an offer. The uniform contract usually in-

¹³⁶ See Pearce, Trade Association Survey 214-27 (TNEC Monograph 18, 1941). An adequate study of the bid depository device would include, *inter alia*, examination of FTC Trade Conference reports, NRA Codes (some thirty-one trades incorporated in their codes of fair competition one or another form of bid depository), the TNEC investigation (with particular reference to monographs nos. 8, 18 and 33), recent antitrust suits (brought by the United States) involving collusive practices by bid-depositories, and a survey of the various devices currently in use locally and an evaluation of their effectiveness.

¹³⁷ Letter from the President of the Building Waterproofers' Association, dated April 9, 1951 (based on thirty years business experience).

cludes a clause making the bid subject to the final approval of the manufacturer, indicating that the manufacturer should prefer that his bid not be considered firm. For example, the Steel Joist Institute in its Code of Standard Practice states:

All proposals for furnishing steel joists and accessories thereto shall be made on a Sales Contract Form. After acceptance by the Buyer, these proposals must be approved or executed by a qualified official of the Seller. Upon such approval, the proposal becomes a contract. All proposals are intended for prompt acceptance and are subject to change without notice.¹³⁸

Thus there appears to be a considerable difference in attitude between the subcontractors' associations and the manufacturers' associations. The latter expect the general contractors to negotiate after the general contract has been awarded and, in fact, do everything to keep their own bids from being considered more than quotations of available but "subject to revision" information.¹³⁹

IV. SUMMARY AND CONCLUSIONS

This article began with the Uniform Commercial Code's firm offer provision, which presumes that in the sale of goods between merchants the law lags behind trade usage. Insofar as the dealings between general and subcontractors fall within the Sales Article of the Code,¹⁴⁰ the Code proposes a reform. The question which this study of cases and survey of

¹³⁸ Code of Standard Practice of the Steel Joist Institute, 7, adopted April 7, 1931, revised October 20, 1949. Similar uniform sales contracts have been proposed by the National Ready Mixed Concrete Association (Standard Clauses for Sales Agreements in the Ready Mixed Concrete Industry, published by the National Ready Mixed Concrete Association, undated) and the Indiana Limestone Institute (information obtained by the writer from the Limestone Institute at Bedford, Indiana).

¹³⁹ Compare the position taken by the defendant manufacturer in *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F. 2d 654 (C.A. 7th, 1941). Additional evidence is found in over one hundred forms obtained from individual materialmen and manufacturers. It is interesting that practically all of these proposals were put in the form of invitations to bid with final approval or acceptance left in the hands of the manufacturer. Frequently it was limited to "credit approval." The forms come from manufacturers of all kinds of building materials. Some of them had specified time limits, the most usual time span being thirty days. Some were named "quotations," other "proposals." Many had numerous standard terms and conditions printed in fine print on the back side. Some incorporated the parol evidence rule, e.g., "only the conditions written in this proposal are binding." Otherwise, the terms included the usual exculpatory conditions. Several had specified acceptance dates, and one had this statement: "Conditioned upon the commencement of delivery within three to four weeks from date of receipt of order and approved erection layout." This seems to keep the final power in the hands of the manufacturer right up to the moment of delivery.

¹⁴⁰ See UCC, § 2-205 (Text & Comments ed., Spring 1950), Comment 2, stating that a "non-merchant's offer may in an appropriate case become irrevocable under this section. . . ." Presumably, the electrician who installs the equipment he sells for a lump sum is a "non-merchant."

business practice raises is the necessity and value of this reform for the construction industry.

One thing is clear: contractors in general are neither aware of nor significantly influenced by the law in this area. This is evidenced not only by the almost total failure of contractors to consider serious use of contractual protective devices but also by their complete unconcern with legal sanctions against contractors who frustrate their expectations.¹⁴¹ It is indirectly shown by the paucity of appellate cases on this particular problem since World War I.

Another fact equally patent is that, as a group, the manufacturers and vendors of basic building materials make a decided effort to take themselves out of the firm offer category and draft their proposals so as to postpone the moment of contracting until after the award of the general contract, retaining final approval power in their own hands.¹⁴²

What about the "material and labor" subcontractors, at least two-thirds of whom do make firm proposals?¹⁴³ A large majority, seventy-five out of ninety-three, felt bound to do the jobs they bid, and in almost every instance because of moral or ethical reasons.¹⁴⁴ Impressive as these responses are, they do not tell the whole story. There was some qualification of this willingness to keep the bid open at all costs.¹⁴⁵ Moreover, thirteen subs stated categorically that they felt free to withdraw in the event of an unexpected rise in the price of materials¹⁴⁶ while in response to another question double that number indicated that they had considered the possibility.¹⁴⁷ Nor is it altogether coincidence that out of the thirteen dissenters only one was notified by generals when his bid was used and only one was notified at once by generals after the award that he had the job.¹⁴⁸ High-handed actions by generals bring equally strong reactions from subs. Clearly, the dissident element among the subs, though not always willing to "break faith" with the generals, reflects in its pro-

¹⁴¹ Not to mention their ignorance of contract law. In fact, one attorney interviewed who had represented half-a-dozen large subcontractors over a thirty year span "assumed that the general contractor could hold the subcontractor legally once the subcontractor had made his bid."

¹⁴² See p. 281 *supra*. This may partly explain the manufacturer's quotation in *Robert Gordon Inc. v. Ingersoll-Rand Co.*, 117 F. 2d 654 (C.A. 7th, 1941), note 24 *supra*.

¹⁴³ "Subcontractor" question 1, p. 264 *supra*.

¹⁴⁴ "Subcontractor" questions 5 and 6, pp. 267-68 *supra*.

¹⁴⁵ See p. 267 *supra*.

¹⁴⁶ "Subcontractor" question 5, p. 267 *supra*.

¹⁴⁷ "Subcontractor" question 7, p. 269 *supra*.

¹⁴⁸ See p. 268 *supra*.

motion of separate contracting, bid depositories and other devices a disgruntlement with the status quo which casts serious doubt as to their submission to the firm offer solution.

Can it be that the draftsmen of the firm offer provision and the critics of Judge Learned Hand for his opinion in *Gimbel Bros.* have looked at the question solely from the general contractor's point of view? Though one would suppose that the general contractor would prefer the firm offer, interestingly enough, only a little more than half the generals surveyed insist upon it.¹⁴⁹ It does not seem to be a problem they worry about. In fact, forty-eight generals stated they would forget a sub's withdrawal,¹⁵⁰ and while thirteen would threaten use of non-legal sanctions and two would threaten suit, not a single general took the matter seriously enough to state that he would actually sue, even were a net recovery guaranteed.¹⁵¹ Furthermore, only twenty out of the eighty generals had ever considered binding the subcontractor before the award and their comment showed very little interest in the suggestion.¹⁵² This very low sensitivity to what many critics assume to be a "business outrage" is underscored by the failure of the generals' public representative, the Associated General Contractors, to promote a standard firm proposal form or any other device which would assist the general to hold the sub to his bid.¹⁵³

Even assuming it is a serious problem from the general contractor's side, is the firm offer provision fair to the subcontractor? Admittedly, in a sophisticated commercial community, fairness may exist where the sub is bound to the general until after the award even though the sub is not able to bind the general. This is so where the general makes use of the sub's proposal in the belief that he can rely on it if he is awarded the contract. This is the essence of the general proposition that in commercial transactions reasonable reliance by the offeree justifies making the offeror's offer firm. But in the construction industry there is more than a little evidence that this is a reliance with tongue in cheek. Thirteen out of the eighty generals admitted to negotiating after the award,¹⁵⁴ and though sixty-five denied it, there is too much evidence from the individual subcontractors and their trade associations as to the generals' negotiating or

¹⁴⁹ "General" question 2, p. 259 supra. Of course, some of the others may assume it.

¹⁵⁰ "General" question 7, p. 261 supra.

¹⁵¹ Ibid.

¹⁵² "General" question 8, p. 262 supra.

¹⁵³ See p. 276 supra. Note also the "stand-offish" attitude of the AIA, p. 277 supra, whose members, in their capacity as agent for the owner, should be concerned.

¹⁵⁴ "General" question 5, p. 260 supra.

shopping for a better price after the award to accept the latter figure at its face value.¹⁵⁵ Such reliance qualified as it seems to be by a freedom to shop is not as persuasive on the point of fairness as is the full-fledged reliance of the offeree in the usual commercial transaction.

Nevertheless, assuming the responses of the seventy-five subs who felt bound to do the job they bid were made in the knowledge that their bid might be shopped,¹⁵⁶ one might ask why should not the law follow the general practice? (That is, why should not the sub's offer be made firm *legally*?) The answer is that there is a marked difference between a voluntary assumption of a firm offer obligation evolved through flexible trade practices in a community and the rigid imposition of a legal sanction to compel compliance with that obligation. Fairness to the subcontractor in this area may well consist of giving him the freedom to manipulate and perhaps improve trade practice. If, as the evidence points, the sub is the weaker party to the bargain, why should the Code add to the imbalance? Moreover, if the general does not need the firm offer provision to get his contracting done, and if its adoption may undercut what little leverage the sub has vis-a-vis the general, what is the justification for it? Surely, not solely the desire to satisfy the aesthetic or ethical impulse for a neat and orderly system of law. Possibly, the firm offer provision will be a boon to the owner, the one whom sub and general are supposed to serve, in terms of more efficient construction at lower costs. This, rather than fairness between the parties, may be the controlling test for judging the operation of legal rules in this area. If so, the burden is on the critics. This is not to say that the firm offer is not desirable in other market areas—the stock exchange or the textile industry. Of this the writer has no knowledge. But on the basis of this study, limited and imperfect as it admittedly is, he cannot so readily assume that the firm offer is either an absolute necessity or an unmitigated good in the construction industry.

¹⁵⁵ Compare the repeated efforts by the subcontractors' trade associations to prevent shopping, pp. 277-81 *supra*. Compare the statement by the Indianapolis general personally interviewed who stated that he never expected to be able to hold a sub to his bid because the prevailing bid shopping practices in the Indianapolis area would cause the sub to consider himself not bound, p. 274 *supra*.

¹⁵⁶ Unfortunately, no question was put to the subcontractors in their questionnaire designed to draw this differentiation. For some free comment to the contrary, see p. 267 *supra*.